IN THE

Supreme Court of the United States

October Term, 1979

No. 78-6621

GILBERT FRANKLIN BECK,

Petitioner,

v.

STATE OF ALABAMA,

Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

BRIEF OF RESPONDENT

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February 7, 1980

Honorable Michael Rodak, Jr.
Clerk
United States Supreme Court
Washington, D.C. 20543

Re: Gilbert Franklin Beck v.
Alabama (No. 78-6621)

Dear Mr. Rodak:

Upon reading petitioner's reply brief yesterday, I was embarrassed to discover that I had misquoted a passage out of one of the Court's opinions. The passage, from Woodson v. North Carolina, 428 U.S. 280, 303 (1976), is as follows:

> it is only reasonable to assume that many juries under mandatory statutes will continue to consider the grave consequences of a conviction in reaching a verdict. (Emphasis added.)

As petitioner correctly points out in footnote 1 of his reply brief, the three words to which emphasis is added were omitted from the quotation of that passage which is contained on page 21 of the brief which I submitted for respondent.

The omission was unintentional, but it is inexcusable that I would have been so careless as to have permitted it to occur. I want to apologize to the Court and to opposing counsel for this error, an error for which I accept full

responsibility. I regret very much that it happened.

Enclosed are extra copies of this letter. If possible, I would appreciate it if you would forward a copy to each member of the Court as my apology.

Respectfully yours,

Ed Carnes

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The Pre-Trial Events

Roy Frank Malone, a retired veterinarian, and Dora Mae Ford, his elderly housekeeper, were robbed and murdered at Malone's home in a rural section of Etowah County, Alabama, on November 8, 1976. That same day,

petitioner was arrested (R. 277-279, 304-305). The next morning, after having been fully advised of his Miranda rights (R. 294-295), and after signing a written waiver of those rights (R. 300-301; S. Ex. 7, R. 315, 317, 1112), petitioner dictated and signed a statement admitting participation in the crime (R. 318-319; S. Ex. 8, R. 337, 1113-1116, A. 22-24). Petitioner did not seriously contest the voluntariness of this statement at trial and his counsel admitted to the court, "if your Honor finds it voluntary I cannot take any real issue . . ." (R. 321). Nor did petitioner raise before the appellate courts below any issue concerning the admissibility or voluntariness of the statement.

Petitioner's statement is contained on R. 1113-1116, and it is reprinted in its entirety in the opinion of the Alabama Court of Criminal Appeals (A. 22-24). In the statement, petitioner admitted that he and Roy Frank Clements had robbed Mr. Malone and Ms. Ford, but denied that he had actually killed them himself (A. 22-23). A relevant portion of his statement is as follows:

> "We got down there the second time & as we drove up in the driveway Mr. Malone came to the door & asked us to come inside, we stayed in the house & talked for a few minutes & Roy had gone to the bathroom, as he was coming back from the bathroom I grabbed Mr. Malone & he went down on his knees & hollered for Aunt Mae to get the gun. Roy then grabbed Aunt Mae & hit her in the head with a Rachet wrench that he had taken out of my truck, at least four times. I did not do any of the cutting but I did hold Mr. Malone down. After Roy knocked Aunt Mae down he then drug her into the living room & then came to where I was holding Mr. Malone down, if there was anyone cut it had to be Roy that did the cutting. Roy then grabbed the billfold & purse & we ran for the truck, I was the one that was doing the driving . . ." (A. 22-23).

Petitioner admitted in his statement that the $73.00 taken during the robbery was split up afterwards (A. 23). Petitioner also admitted that he burned the clothes he had worn during the crime and that he threw the victims' billfold and purse over the side of a mountain (A. 23).[1]

Petitioner was indicted for the first degree murder of Roy Malone during the course of robbing him (R. 821, A. 17-18). That crime is a capital offense under the provisions of *Code of Alabama* 1975, §13-11-2(a)(2)[2]. He was also charged in a separate indictment for the same offense wherein Dora Mae Ford was the victim (R. 100), but that

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[1]Roy Clements, the other participant in the crime, also gave a statement after his arrest, and his statement is reproduced in *Clements v. State*, 370 So.2d 708, 718-721 (Ala. Cr. App. 1978), *rev'd on state law grounds*, 370 So.2d 723 (Ala. 1979). Clements testified in his own behalf at his trial for the capital felony of murdering Dora Mae Ford during the course of robbing her, and that testimony is summarized in *Clements v. State*, 370 So.2d at 711-712. In his statement and in his trial testimony, Clements insisted that petitioner, who was 12 years older than he, 370 So.2d at 718, A. 22, had instigated the robbery and had actually killed both Roy Malone and Dora Mae Ford. Clements insisted that after petitioner surprised him by cutting Mr. Malone's throat, Clements ran outside and petitioner came out later with the victims' purse and billfold. 370 So. 2d at 711-712, 719-720.

[2]Section 3-11-2(a)(2), which defines the capital offense, does not require that the robbery victim be murdered in the first degree but simply that the victim be intentionally killed. However, the indictment against petitioner gratuitously averred that the intentional killing of Malone was committed "with malice aforethought," and those three words constitute an averment of first degree murder under Alabama law. *See, Code of Alabama* 1975, §15-8-150(72). The Alabama Supreme Court has held that while such an additional averment in a capital case is not required, it is permissible, but if the state avers that the robbery victim was murdered in the first degree instead of simply intentionally killed, then the state must prove murder in the first degree. *E.g., Clements v. State*, 370 So.2d 723, 725 (Ala. 1979); *Jacobs (John L.) v. State*, 371 So.2d 448, 449 (Ala. 1979).

indictment has not been brought to trial.[3]

The Evidence at Trial

At petitioner's trial, it was undisputed that Roy Malone had been killed by having his throat stabbed or cut (R. 228-229), and petitioner admitted that the killing took place while petitioner and Roy Clements were robbing Mr. Malone (R. 212-213, A. 57, 60-61). However, petitioner claimed that he "drew no blood from anybody on that occasion," that he had not anticipated that anyone was going to be killed, and that Roy Clements had actually done the killing (R. 213, A. 56-58).

Mary Ann Thrasher, the woman with whom petitioner was living at the time of the crime (R. 383-384, 411), was a witness for the state. She testified that before petitioner and Roy Clements left to commit the robbery, petitioner had been sharpening his knife on a whet rock (R. 385-388). She said that she had not seen Clements with a knife (R. 434). About an hour after petitioner and Clements had left to commit the robbery, they returned and explained that three men had driven up at Mr. Malone's house (R. 388). Petitioner and Clements waited an hour and a half or two hours and then went back to Mr. Malone's house (R. 388). When Thrasher saw petitioner and Clements again approximately two and a half hours later, they had Roy Malone's billfold and Dora Mae Ford's purse (R. 389-390). Petitioner's clothing and boots had blood on them (R. 395,397). Petitioner changed clothes and then burned the

[3]Alabama law prohibits the joint trial of indictments involving different victims or crimes, and because of limited criminal justice system resources the usual practice is to pursue only one such indictment against a defendant. While petitioner was prosecuted under the capital indictment in which Roy Malone was named as the victim, Roy Clements was prosecuted under the capital indictment in which Dora Mae Ford was named as the victim. See *Clements v. State*, 370 So.2d 708 (Ala. Cr. App. 1978), *rev'd on state law grounds*, 370 So.2d 723 (Ala. 1979). The apparent reason for the difference is that while each claimed the other one did the actual killing of the victims, petitioner admitted holding Malone down and Clements admitted holding Ford. See p. 3, n. 1, *supra*.

pants, shirt, and jacket that he had been wearing (R. 392-394).

Deborah Clements is Mary Ann Thrasher's daughter and Roy Clement's wife (R. 477-478). She testified as a witness for the state. She said she had not seen petitioner sharpening a knife before the robbery, but she also said she had been in another part of the house most of the time (R. 488-490), a fact which petitioner himself admitted (R. 584). She testified that she had never known Roy Clements to carry a knife (R. 490). She also testified that after returning from the robbery, petitioner said, "We did it" or words to that effect (R. 481-482, 496-497). When they returned from the robbery, petitioner had blood on his clothing, but she didn't see any on Clements (R. 507). After petitioner burned some of his clothing, the group drove to a place halfway up a mountain where petitioner got out of the car and threw Roy Malone's billfold and Dora Mae Ford's purse off the mountainside (R. 483-484).

After petitioner was arrested, his boots were seized and later examined by a criminalist (S. Ex. 9, R. 458-460), an expert in examination of physical evidence (R. 451-453). The criminalist testified at trial that he had found human bloodstains on the left boot near the top of the toe (R. 458, 466). He also testified that there were at least six spots of blood on the boot, and that the blood was in a droplet formation and was not a smear (R. 466, 468).

The state introduced into evidence at trial petitioner's statement in which he admitted, among other things, having held Mr. Malone down during the crime (S. Ex. 8, R. 337, 1113-1116, A. 22-24).

After the state rested, petitioner presented several witnesses in an attempt to impeach the credibility of Mary Ann Thrasher (R. 543, 562, 659). However, petitioner did not dispute the truthfulness of Deborah Clements' testimony, and instead admitted, "She didn't lie about nothing. Debbie Clements told the truth about everything. I'll testify to that." (R. 584).

During his testimony, petitioner admitted that he had

jumped Mr. Malone on a prearranged signal from Roy Clements (A. 57, 59). He denied cutting or killing Mr. Malone and said that Clements had done it (A. 57-58). However, petitioner admitted that at the time he claims that Clements cut Mr. Malone's throat, petitioner had Mr. Malone down on his hands and knees and was holding him from behind (A. 57, 59-60).

Petitioner attempted to explain having to burn his clothing after the crime by claiming that during the crime he had gotten "a little bit of blood, just a small amount on my right hand," and saying that when he slung his hand to get the blood off one drop went on his pants, one drop went on his jacket, and one drop went on his boot (R. 598-599).

Petitioner testified that he did not anticipate that Mr. Malone would be killed during the robbery (A. 56). However, petitioner did not explain how he had planned to get away with robbing someone who not only could identify him but also knew who he was. Petitioner did not deny that Mr. Malone knew him. Indeed, petitioner admitted as much. Petitioner testified that Clements and he had been unable to rob Mr. Malone on their earlier trip that day because three men who Mr. Malone knew drove up in the driveway (R. 585-586). Petitioner testified that Mr. Malone introduced the three men to him (R. 586).[4]

The Jury Instructions

The trial court instructed the jury that petitioner was charged with the capital offense of murdering Roy Malone in the first degree during the course of robbing him (A. 3, 8, 14). It explained the elements of robbery (A. 7-8) and the elements of first degree murder (A. 8). Pursuant to *Code of Alabama* 1975, §13-11-2(a), the jury was not permitted to convict on any lesser included offenses (A. 9).

The court instructed the jury on the presumption of

[4]In making its sentencing determination, the trial court specifically found as an aggravating circumstance that the capital felony was committed for the purpose of avoiding or preventing an arrest because the two eyewitness victims were killed (A. 34). But see p. 10, n. 9, *infra*.

innocence (A. 4), and it repeatedly instructed the jury that the jury could not convict the petitioner unless convinced beyond a reasonable doubt of the existence of all the elements of the capital offense (A. 4-5, 7-8, 10-11, 13-14). The court made it clear to the jury that before there could be a conviction, the jury had to be not only convinced beyond a reasonable doubt that petitioner had committed a robbery but in addition thereto it had to be convinced beyond a reasonable doubt that petitioner was also guilty of first degree murder:

> "The Court charges the jury that you cannot convict the Defendant under this indictment if you believe beyond a reasonable doubt and to a moral certainty that Defendant is guilty of robbery and if you do not believe beyond a reasonable doubt and to a moral certainty that Defendant is guilty of the offense of murder in the First Degree as charged in the indictment.
>
> The Court charges the jury that you cannot convict the Defendant if you believe from the evidence Defendant is guilty of the offense of Murder in the First Degree as charged in the indictment, if you do not believe beyond a reasonable doubt and to a moral certainty the Defendant is guilty of the offense of[5] robbery as charged in the indictment.
>
> The Court charges you that you cannot convict the Defendant if you are not convinced beyond a reasonable doubt and to a moral certainty that Defendant is guilty of robbery as charged in the indictment and Murder in the First Degree as charged in the indictment.
>
> The Court charges the jury, if you are not convinced beyond a reasonable doubt that Defendant robbed Roy Malone as charged in the indictment and murdered Roy Malone as charged in the indictment and you are

[5]This word is printed as "or" in the appendix (A. 14), but the record shows that the court said "of" (R. 753).

not convinced beyond a reasonable doubt on the fixing of death you cannot convict the Defendant and fix his punishment at death.

The Court charges the jury that you must be convinced beyond a reasonable doubt and to a moral certainty that Defendant did commit the offense of robbery against the person of Roy Malone as alleged in the indictment, and you must be convinced beyond a reasonable doubt and to a moral certainty that the Defendant did commit the offense of Murder in the First Degree against the person of Roy Malone as charged—as alleged in the indictment before you can return a verdict of guilty." (R. 753-754, A. 13-14)

The trial court's instructions meant that before the jury could convict petitioner of the capital offense it had to find that petitioner had committed the "willful, deliberate, malicious and premeditated killing" of Roy Malone (A. 8). As the court explained to the jury, "willfullness as an ingredient of murder in the first degree, means governed by the will without yielding to reason — It means intention" (A. 8). The court further defined the requisite intent as follows:

"Intent expresses mental action at its most advanced point or as it actually accompanies an outward corporal act which has been determined on. Intent shows the presence of will, and that the act which consumates a crime. It is the exercise of intelligent will, the mind being fully aware of the nature and consequence of the act which is about to be done, and with such knowledge and with full liberation of action willing and electing to do it." (A. 8-9)

The court did instruct the jury on the law of aiding and abetting and on the law making one conspirator in a criminal activity responsible for consequent acts growing out of the conspiracy, but it added:

"While the parties are responsible for consequent acts growing out of the general design they are not

responsible for independent acts growing out of particular acts of individuals." (A. 6)

In view of the instructions on intent which the court gave elsewhere in its charge, the jury could not have convicted petitioner of the capital offense unless it was convinced beyond a reasonable doubt that petitioner was at least an accomplice to the intentional killing of the victim.[6] In any event, petitioner did not raise any issue concerning the conspiracy or aiding and abetting aspects of the court's charge in his appeal to the Alabama appellate courts.

While the jury was not permitted to consider convicting the petitioner for any lesser included offense, the jury did have available an option other than convicting petitioner of the capital offense or acquitting him. The court instructed the jury that if it failed to agree on a verdict a mistrial would be entered (A. 9), and at the request of the petitioner's counsel further instructed the jury:

"The Court charges the jury that in the event that all of your number cannot agree upon a verdict, that judgment of mistrial must be entered by the Court and that Defendant may be tried again for the aggravated offense or may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance." (A. 13)

In a similar vein, petitioner's counsel told the jury during closing argument that if petitioner had an opportunity under a mistrial and re-indictment to plead to guilty to robbery or murder and get a life sentence he would do it (A.

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[6]In *Ritter v. State*, 375 So.2d 270, 274-275 (Ala. 1979), the Alabama Supreme Court construed the capital punishment statute to permit an accomplice to be convicted of the capital offense, if he was actually " an accomplice to the intentional killing" itself. See p. 62, *infra*. It also addressed the issue reserved by the plurality in *Lockett v. Ohio*, 438 U.S. 586, 609, n. 16 (1978), of whether the death penalty was a constitutionally disproportionate sentence for an accomplice, and held that under the facts in *Ritter* the death penalty was constitutionally permissible. 375 So.2d at 275. In this case, the facts do not clearly present that issue, petitioner did not raise it in the trial court or in the appellate courts below, and it is outside the scope of the order granting certiorari.

62).[7]

The Verdict and the Sentence

After deliberating one hour and thirty minutes (R. 757), the jury convicted the defendant as charged (R. 758). Following the jury's verdict, the court scheduled a sentence hearing to aid the court in determining whether to sentence petitioner to death or life imprisonment without parole.[8] At that hearing, both the state and the petitioner presented witnesses and argument on the question of whether petitioner should be sentenced to death or life imprisonment without parole (R. 762-812). Thereafter, based upon the evidence he had heard at trial and at the sentence hearing and after considering the arguments of the parties, the trial court entered findings of aggravating and mitigating circumstances, and then sentenced petitioner to death (R. 812-813, A. 34).[9]

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[7]Section 13-11-2(c) provides that if a mistrial is entered the defendant may be tried again for the capital offense (an "aggravated offense") or may be re-indicted for a non-capital offense (an "offense wherein the indictment does not allege an aggravated circumstance").

[8]Under section 13-11-2(a), the jury verdict form convicting a defendant must "fix the punishment at death," but the trial court judge, not the jury, is the sentencing authority. See pp.25-26, *infra*.

[9]In determining sentence, the trial court found and considered four aggravating circumstances (R. 812-813). Although petitioner did not raise in the Alabama appellate courts any issue concerning those findings, Alabama Supreme Court decisions rendered after petitioner was sentenced establish that two of them were erroneous as a matter of state law.

One of these was the trial court's finding that the capital felony was committed for pecuniary gain within the meaning of section 13-11-6(6) (R. 812). *Cook v. State*, 369 So.2d 1251 (Ala. 1979), held that that particular aggravating circumstance could not be found and considered when the capital felony was murder during the course of robbery, as in the present case. The second aggravating circumstance finding shown to be erroneous by a subsequent decision is the trial court's finding that since the two eyewitness victims were killed the capital felony was committed for the purpose of avoiding or preventing a lawful arrest within the meaning of section 13-11-6(5) (R. 812-813). In the recent case of *Anthony O'Hara Johnson v. State*, No. 78-670, (Ala. Dec. 7, 1979), the

[footnote continued on next page]

The State Court Appeals

On appeal to the Alabama Court of Criminal Appeals petitioner raised several federal issues including one involving the constitutionality of precluding lesser included offenses, his arguments were rejected, and his conviction and sentence were affirmed. *Beck v. State*, 365 So.2d 985, 999-1003 (Ala. Cr. App. 1978). On appeal to the Alabama Supreme Court petitioner only raised a state law issue and did not ask the court to review the Court of Criminal Appeals holdings in regard to any federal issue. *Beck v. Alabama*, 365 So.2d 1006, 1007 (Ala. 1978). Noting that the petitioner did not ask it to review anything but the Court of Criminal Appeals' holding on the state law issue, the Alabama Supreme Court affirmed that court's decision affirming petitioner's conviction and sentence. *Id.*

[footnote continued from preceding page]

Alabama Supreme Court held that that aggravating circumstance applied only when the persons killed were attempting to make a lawful arrest or prevent an escape, and that it cannot be found to exist merely because victim witnesses were killed.

Accordingly, if this Court affirms petitioner's conviction, when the case returns to the Alabama appellate courts a new sentence determination will have to be ordered. Even though the trial court's findings concerning two other aggravating circumstances (R. 812-813) are correct, a new sentence determination by the trial court will still be necessary. *E.g., Cook v. State, supra; Anthony O'Hara Johnson v. State, supra.*

SUMMARY OF ARGUMENT

The preclusion of lesser included non-capital offenses by Alabama's capital punishment statute serves to promote rational and consistent sentencing in capital cases by removing an historically proven source of de facto discretion. While the risk or level of arbitrariness and capriciousness in capital sentencing can be reduced to a constitutionally tolerable amount without preclusion, the reduction of it even further than the Constitution requires is a legitimate state purpose. Preclusion is especially important under Alabama's statute because the state has chosen to pursue the advantages of judicial sentencing to the utmost and thereby maximize rationality and consistency in sentencing while at the same time seeking to ensure the reliability of fact-finding by requiring that juries make specific reference to the penalty of death in any verdict convicting a defendant of a capital offense.

Preclusion does not undermine the proof beyond a reasonable doubt standard or jeopardize the reliability of fact-finding in cases tried under Alabama's statute. Petitioner's assumption that juries cannot be trusted to follow their instructions and acquit capital defendants who are only guilty of non-capital offenses but instead will disobey their oaths and instructions and wrongfully convict defendants of capital offenses for which they are not guilty is not proven by statistics showing a high conviction rate under Alabama's statute. The lesser included offense doctrine originated to protect prosecutors from suffering acquittals when they fail to prove some element of the higher offense charged, *Keeble v. United States*, 412 U.S. 205, 208 (1973), and the conviction statistics reflect that prosecutors have responded to the non-availability of that protection by prosecuting only the strongest capital cases as capital cases.

Petitioner's speculative assumption that preclusion will cause juries to act lawlessly and wrongfully convict defendants of capital offenses should be rejected for three

reasons. First, it casts doubt upon the basic integrity of our jury system which is premised upon juries following their instructions. Second, it is contradicted by the historical evidence which shows that juries have always been more cautious, more compassionate, and far more reluctant to convict in capital cases than in non-capital cases. Juries are meticulous in their regard for the rights of capital defendants, and if they do disobey their oaths and instructions it is to favor those defendants. This historical evidence has been cited and the predictability of juries' different behavior in capital cases relied upon in cases such as *Woodson v. North Carolina*, 428 U.S. 280, 289-296, 302-303 (1976) (plurality opinion). *Accord, Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring); *id.* at 388, 402 (Burger, C.J., dissenting); *see e.g., Witherspoon v. Illinois*, 391 U.S. 510, 519-520 (1968) (juries "express the conscience of the community"); *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (joint opinion) (juries reliably reflect society's values and evolving standards of decency).

The third reason petitioner's speculative assumption should be rejected is that it ignores safeguards built into Alabama's statute to ensure that a defendant is not wrongfully convicted of a capital offense. The first is the requirement that any verdict convicting a defendant of a capital offense "fix the penalty at death," even though the jury is not the sentencing authority. This requirement ensures that the awesome nature of the jury's task in deciding guilt and the terrible responsibility it assumes in convicting a defendant of a capital offense will be impressed upon each juror. It thereby serves to reinforce the proof beyond a reasonable doubt standard by calling upon the historical reluctance of jurors to convict in cases in which death is the result. The second statutory safeguard is the mistrial and re-indictment clause which provides that if the jury is unable to agree on a verdict of guilty or not guilty or on the fixing of the penalty at death in the verdict a mistrial is declared and the defendant can thereafter be re-indicted for a non-capital offense. The

availability of the mistrial option and the possibility of re-indictment means that the jury is not forced to choose between acquitting a defendant who is guilty of a serious non-capital offense and wrongfully convicting him of a capital offense for which he is not guilty. In this case, the jury was specifically instructed about its mistrial option and the re-indictment possibility. The third statutory safeguard is the sentencing function performed by the trial judge who weighs aggravating and mitigating circumstances in deciding the sentence of a convicted capital defendant. The trial judge is not bound by any fact-finding implicit in a guilty verdict, and can consider as a non-statutory mitigating circumstance the quantum of evidence. The reliability of sentencing decisions is further safeguarded by appellate review.

Keeble v. United States, 412 U.S. 205 (1973), was decided on the basis of statutory interpretation and did not hold that preclusion of lesser included offenses violated due process. The only constitutional holding in *Keeble* was the implicit holding of the dissent that preclusion was constitutionally permissible. The observations of the *Keeble* majority about the possibility that preclusion might cause a jury to convict a defendant of a higher offense than he was guilty of are not applicable to cases tried under Alabama's capital punishment statute because juries behave predictably different in capital cases, and because Alabama's statute has special safeguards that reinforce the reasonable doubt requirement and further ensure the reliability of fact-finding. Contrary to petitioner's assertions, dictum in a footnote contained in the joint opinion in *Gregg v. Georgia*, 438 U.S. 153, 199 n. 50 (1976), does not state the preclusion is alien to our system of criminal justice and unconstitutional.

The fact that lesser included offenses have historically been available and that Alabama is the only jurisdiction which precludes lesser included non-capital offenses does not mean that preclusion is unconstitutional. *Johnson v. Louisiana*, 406 U.S. 356 (1972), held that due process did

not require jury unanimity despite the fact that the unanimous jury, which originated as early as the 14th century is embedded in our legal history, and upheld Louisiana's 9 to 3 rule even though no other state had one like it. *Williams v. Florida*, 399 U.S. 78 (1970), held that states were not required to use twelve-member juries even though that had been the fixed number for five hundred years, even though earlier decisions had assumed that number was constitutionally required, and even though the federal courts and virtually all the states used that number. In accord with these principles is *Leland v. Oregon*, 343 U.S. 790 (1972), the continuing validity of which was noted in *Patterson v. New York*, 432 U.S. 197, 204-205 (1977).

Petitioner's claim that the preclusion of lesser included offenses in capital cases but not in non-capital cases violates the Equal Protection Clause is not properly before this Court, because he did not raise that issue in the trial court or in the state appellate courts. *Fuller v. Oregon*, 417 U.S. 40, 50 n. 11 (1974); *Street v. New York*, 394 U.S. 576, 581-582 (1969). Alternatively, that claim should be rejected because the distinction is rationally related to the purpose of preclusion since the availability of lesser included offenses in non-capital cases does not threaten the consistency of capital sentencing. The strict scrutiny test should not be applied because preclusion does not infringe upon a fundamental right, which is a right "explicitly or implicitly guaranteed by the Constitution." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 33-34 (1973). The availability of lesser included offenses is not a right guaranteed either explicitly or implicitly by the Constitution, and preclusion does not infringe upon the right to proof beyond a reasonable doubt or the right to reliable fact-finding.

Preclusion does not violate the Eighth Amendment. It does not prevent individualized sentencing or undermine the reliability of the sentencing process. Under Alabama's statute, the trial judge holds a sentencing hearing to

determine the particular circumstances concerning the offense and the offender. At the hearing evidence may be presented on any matter relevant to sentencing, and the judge is free to consider non-statutory mitigating circumstances. In making the sentence findings, the judge is not bound by any fact-finding contained in the jury's verdict. The trial judge determines the sentence based upon a weighing of the aggravating and mitigating circumstances that the judge has determined to exist, and if the judge sentences a defendant to death the evidence of aggravating and mitigating circumstances is reviewed and reweighed at the appellate level.

Neither preclusion nor any other factor has caused an improperly high percentage of capital defendants to be sentenced to death in Alabama. The sentencing statistics reflect the fact that Alabama's statute has limited capital offenses to a narrowly defined group which are most deserving of the death penalty, evidence that arbitrariness and capriciousness in sentencing have been reduced accordingly, and indicate that exactly what Mr. Justice White predicted in *Gregg v. Georgia*, 428 U.S. 153, 222 (1976) (concurring opinion), should occur has occurred.

The singularity of Alabama's procedure in precluding lesser included non-capital offenses does not indicate a violation of the Eighth Amendment. The purpose of the Cruel and Unusual Punishments Clause is not to compel uniformity of trial procedure, and each capital statute upheld by this Court contains at least one unusual or unique procedure. *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (joint opinion), held that no particular system of procedures was required in capital cases and that each distinct system must be examined on an individual basis.

ARGUMENT

I.

THE PRECLUSION OF LESSER INCLUDED NON-CAPITAL OFFENSES DOES NOT UNDERMINE THE PROOF BEYOND A REASONABLE DOUBT STANDARD OR JEOPARDIZE THE RELIABILITY OF THE FACT-FINDING PROCESS IN A CAPITAL CASE TRIED UNDER ALABAMA'S STATUTE

Central to virtually all of the petitioner's arguments is the assumption that the preclusion of lesser included non-capital offenses in a capital case undermines the proof beyond a reasonable doubt standard and jeopardizes the reliability of the fact-finding process. Petitioner's assumption is based on speculation that if the evidence proves a defendant guilty of a non-capital offense but not of the capital offense with which he is charged, the jury might wrongfully convict the defendant of the capital crime rather than acquit him. Not only is petitioner's assumption based upon speculation, but the historical evidence of jury behavior in capital cases, this Court's reliance on that behavior in the past, and the special safeguards contained in Alabama's statute all establish that petitioner's assumption is unwarranted.

A. The Historical Evidence Concerning Jurors' Attitudes and Behavior in Capital Cases Establishes that Jurors in Such Cases are Reluctant to Convict and Do Resolve All Doubts in Favor of Capital Defendants, and this Court has Relied Upon the Predictability of that Behavior Before

As Mr. Justice Brennan noted in *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring), "Juries, of course, have always treated death cases differently . . ." Juries have always been more cautious, more compassionate, and far more reluctant to convict in capital cases than in non-capital cases. Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54

B.U.L. Rev. 32 (1974), collects nineteenth century documentation of the willingness of jurors to seize upon any doubt, however specious or irrational, as an excuse to acquit a defendant rather than convict him of an offense where the penalty is death. Representative of that documentation is the report of a committee of the New York Assembly in 1841 which urged abolition of capital punishment because:

> "The *uncertainty of conviction*, by juries, for capital offenses, has grown almost into a proverb. There can be no criminal lawyer in this State, of any extended practice or observation, by whom this remark will not be received as a truism . . . Juries are always, and will always be, powerfully swayed in their judgment, as well as in their feelings, by that horror of shedding the blood of their fellow-man, which the laws of God have planted too deeply in the hearts of all to be eradicated, however it may be weakened, by the influence of any laws of man. In the clearest cases, it is constantly seen they *will not* convict . . . It is vain to talk of the juror's oath. They *will* violate them, by what their consciences regard as only pious perjuries, under a thousand pleas of technical deficiencies or imperfections of evidence, however immaterial in their nature."[10]

Accord, *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) (plurality opinion) ("At least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict.")

Indeed, the great reluctance of jurors to convict in any case in which capital punishment is the penalty has served as the motivating factor behind most of the legislative developments in this area of the law. These developments

[10]J. O'Sullivan, Report in Favor of the Abolition of the Punishment of Death 72 (2d ed. 1841), as quoted in Mackey, *supra* at 33-34 (emphasis in original).

are traced in *Woodson v. North Carolina*, 428 U.S. at 289-296 (1976) (plurality opinion). In the beginning, death was the exclusive and mandatory sentence for capital offenses which were broadly defined to include a wide range of crimes. 428 U.S. at 289. Jurors reacted unfavorably to the harshness of mandatory death sentences, and refused to convict a significant number of palpably guilty defendants. 428 U.S. at 289, 293 (plurality opinion); *id.* at 311 (Rehnquist, J., dissenting); Mackey, *supra*. The States initially responded to this problem of jury nullification by limiting the classes of capital offenses, but jurors still frequently refused to convict even murderers rather than subject them to automatic death sentences. *Woodson v. North Carolina*, 428 U.S. at 290 (plurality opinion). The next legislative response was to divide murder into degrees, thereby creating lesser included offenses, with death being the punishment only for murder in the first degree. *Id.; Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 333 n. 8 (1976) (plurality opinion). After the division of murder into degrees, juries continued to find the death penalty inappropriate in a significant number of first degree murder cases and as a result returned verdicts for a lesser degree of murder even when the defendants were clearly guilty of murder in the first degree. *Woodson v. North Carolina*, 428 U.S. at 291, 293 & n. 29, 302 (plurality opinion); *McGautha v. California*, 402 U.S. 183, 199 (1971).

Finally, because of the lack of success in attempting to prevent jury nullification under any type of mandatory statute, legislators gave in and decided to legitimize the effects of jury nullification by enacting discretionary sentencing statutes. *Woodson v. North Carolina*, 428 U.S. at 291-293 (plurality opinion); *McGautha v. California*, 402 U.S. at 199. Jurors' reluctance about the death penalty and compassion for capital defendants had a pronounced effect upon sentencing under discretionary statutes. The result was that jurors operating under discretionary statutes returned death sentences in only a minority of first degree murder cases. *Woodson v. North Carolina*, 428 U.S. at 295

& n. 31, 302 (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 299 (Brennan, J., concurring). As Mr. Chief Justice Burger has noted, "juries have been increasingly meticulous in their imposition of the [death] penalty" and "[t]he very infrequency of death penalties imposed by jurors attests their cautious and discriminating reservation of the penalty for the most extreme cases." *Furman v. Georgia*, 408 U.S. at 388, 402 (Burger, C.J., dissenting).

The historical record rebuts petitioner's speculation that jurors will callously disregard their oaths and disobey their instructions in order to wrongfully convict a defendant of a capital crime. Instead, history shows that jurors are meticulous in their regard for the rights of capital defendants, extremely reluctant to convict when death is the penalty, and if they do disobey their oaths and instructions it is to favor the defendant.

This Court has relied in past cases upon the predictable compassion of jurors for the rights of capital defendants. The decision in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), was based upon the observation that jurors "express the conscience of the community on the ultimate question of life or death." *Id.* at 519-520 (footnote omitted); *accord*, *Furman v. Georgia*, 408 U.S. at 299 (Brennan, J., concurring). Indeed, a majority of this Court has recognized that the action of juries in capital cases is a reliable reflection of contemporary values and of the prevailing standards of decency in our society. *Coker v. Georgia*, 433 U.S. 584, 596-597 (1977) (plurality opinion of White, J., joined by Stewart, Blackmun, and Stevens, J.J.); *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.) [hereafter cited as "joint opinion"]; *Woodson v. North Carolina*, 428 U.S. at 293, 295 (plurality opinion of Stewart, Powell, and Stevens, J.J.); *Furman v. Georgia*, 408 U.S. at 440-441 (Powell, J., dissenting). In *McGautha v. California*, 402 U.S. 183, 207-208 (1971), this Court expressly held that States were entitled to assume that jurors in capital cases "will act with

due regard for the consequences of their decision . . ." That specific holding was not obliterated by *Furman*, but instead became one of the underpinnings of the plurality opinion in *Woodson v. North Carolina*, *supra*, which held that, "it is only reasonable to assume that many juries will continue to consider the consequences of a conviction in reaching a verdict." 428 U.S. at 303. The reason that mandatory statutes simply "papered over the problem of unguided and unchecked jury discretion," *id.* at 302, is the same reason that the preclusion of lesser included non-capital offenses by Alabama's statute does not undermine the integrity of the fact-finding process in capital cases — jurors are and always have been extremely cautious and reluctant to convict in any capital case in which death appears to be the automatic result, and they resolve doubts in such cases in favor of the capital defendant.

B. Alabama's Statute Contains Special Safeguards that Ensure the Reliability of the Fact-Finding Process

The Alabama capital punishment statute contains special safeguards which ensure the reliability of the fact-finding process and prevent the preclusion of lesser included offenses from resulting in a wrongful imposition of the death penalty. The first safeguard is the requirement of *Code of Alabama* 1975, §13-11-2 that before any defendant can be found guilty of a capital offense the jury must return a verdict form which "fix[es] the punishment at death," even though the judge and not the jury is the sentencing authority, see pp. 25-26, *infra*. The requirement that the jury in returning any guilty verdict "fix the punishment at death" ensures that the awesome nature and terrible responsibilities of the jury's task in finding the defendant guilty of a capital offense will be fully impressed upon each juror. It serves to reinforce the requirement of proof beyond a reasonable doubt by calling upon the historical reluctance of jurors to convict in any case where death is the result. The jury is encouraged to

think that "the buck stops here."[11]

The second safeguard contained in Alabama's statute is the mistrial mechanism. Section 13-11-2(c) provides:

> "The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole."

An "aggravated offense" is one of the capital crimes defined in section 13-11-2, and an "offense wherein the indictment does not allege an aggravated circumstance" is a non-capital crime. Therefore, when a defendant in a capital case is guilty of a serious non-capital crime but there is a reasonable doubt about his guilt of the capital offense, the jury is not required to choose between convicting or acquitting him. It has a third choice — mistrial. If there is a mistrial on the capital charge the defendant may be re-indicted and retried for a non-capital

[11]Of course, the trial court and not the jury actually makes the sentencing determination, see pp. 25-26, *infra*. The Alabama appellate courts have not addressed the issue of whether jurors may be informed that even if they convict a defendant and "fix the punishment at death" the judge actually determines whether the defendant will be sentenced to death or to life imprisonment without parole. In the present case, the trial court specifically declined to instruct the jury about the subsequent sentence hearing which would be held by the trial court if the jury returned with a guilty verdict (A. 11), and there is no indication in the record that the jury otherwise knew that the judge would ultimately determine the sentence. Even if the jury were told that the punishment it "fix[es]" is not final, the requirement that the jury verdict make express reference to the penalty of death would still serve to impress upon jurors the need for great caution.

offense.

At the request of petitioner's trial counsel, the jury in this case was expressly informed of its mistrial option during the oral charge:

> "The Court charges the jury that in the event that all of your number cannot agree upon a verdict, that judgment of mistrial must be entered by the Court and that Defendant may be tried again for the aggravated offense or may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance." (A. 13)

That instruction was read by the trial court after petitioner's counsel submitted it in writing (R. 910, A. 13).[12] Furthermore, during closing argument, petitioner's trial

[12]The Alabama Supreme Court has not yet addressed the issue of whether the trial court is required to instruct the jury on the mistrial option when requested to do so by the defendant. In *Phillip Wayne Tomlin v. State*, 1 Div. 23, slip op. at 12-13 (Ala. Cr. App., Nov. 20, 1979), the jury asked the trial court what would happen if there was a "hung jury," and the judge told them that in the event of a mistrial the same charge would be heard by another jury in the future. The defendant neither objected to the trial court's instructions nor requested any instruction about the re-indictment option. Slip op. at 13. On appeal, the Court of Criminal Appeals held that since the re-indictment option rested entirely with the state, the instruction was correct as far as it went, and if the defendant had wanted the jury to be instructed about the re-indictment option he should have asked the court to give such an instruction. Slip op. at 12-13. The Alabama Supreme Court has not yet reviewed that holding.

The court in *Evans v. Britton*, 472 F. Supp. 707, 715 n. 14 (S.D. Ala. 1979), expressed its opinion that there was a "practice in state courts in capital cases of not instructing the jury of their right to mistry the case." There was no support in the record in that case for such an observation. In any event, there has been no finding by any court that it is a "practice" of state courts to refuse to instruct jurors on the mistrial option when requested by the defendant to do so. In *Jacobs v. State*, 361 So.2d 607 (Ala. Cr. App. 1977), *aff'd*, 361 So.2d 640 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979), this Court denied certiorari in a capital case in which the record showed that the jury was instructed on the mistrial and re-indictment option at the request of the defendant. See Jacobs v. Alabama (U.S. October Term 1978, No. 78-5696, R. 568-569). In any event, in the present case, the petitioner requested and did receive the benefit of such an instruction.

counsel told the jury:

> "I'm not telling you that this man should not be punished. We told you from the beginning that we believe that punishment, life imprisonment. And I'll tell you this, if I can have any opportunity under any reindictment or any other way to take him before this bar of justice and enter a plea of guilty of murder, robbery, either one, life in prison, I'll take him. I'll take him . . ." (A. 62)

Therefore, the jury could not have been forced to choose between acquitting a defendant who was guilty of a serious non-capital offense or wrongfully convicting him of a capital offense for which he was not guilty. Instead, if the jury concluded that the defendant was not guilty of the capital offense but was guilty of a serious non-capital offense, then all it had to do to prevent his discharge was to fail to agree "on a verdict of guilty or not guilty or on the fixing of the penalty of death," and the petitioner could then be re-indicted and retried for the non-capital offense. That is what the statute expressly provides, that is what the court instructed the jury, and that in effect, is what petitioner's trial counsel asked the jury to do. The court noted in *Evans v. Britton*, 472 F. Supp. 707, 714-715 (S.D. Ala. 1979),[13] that at the time of the decision in that case (June 11, 1979) there had been mistrials in three cases tried under the Alabama capital punishment statute.[14]

Of course, if all of the members of the jury have a reasonable doubt about a defendant's guilt of the capital offense then it should return a verdict of acquittal, and the jury was so instructed in this case (A. 4, 9, 11, 13-15). The

[13]In the Federal Reporter advance sheets and in petitioner's brief the respondent's name in the style of that case is misspelled "Birton," and in the bound volume of the Federal Reporter it is misspelled "Birtton". The respondent in that case is Robert G. Britton, Commissioner of the Alabama Board of Corrections.

[14]Since the date of the *Evans v. Britton* opinion and the filing of the stipulation to which it refers, there have been mistrials in other cases tried under Alabama's capital punishment statute but those additional mistrials are not reflected in any opinion or other published source.

importance of the mistrial option is that is answers petitioner's speculative fears that a jury might violate such instructions and wrongfully convict a defendant of a capital offense rather than acquit him. The mistrial option means that even if a jury does disobey its instructions and refuse to acquit in such a circumstance, it still will not be compelled to wrongfully convict the defendant of a capital offense. Instead, it can simply refuse to reach a verdict or refuse to agree on the "fixing of the penalty of death" in the verdict form and thereby cause a mistrial.

The third safety device contained in Alabama's statute results from the sentencing function performed by the trial judge. Although the verdict of the jury convicting a defendant "fix[es] the punishment at death," section 13-11-2(a), the trial court judge and not the jury is the sentencing authority. *Code of Alabama* 1975, §§13-11-3 and 13-11-4; *accord, e.g., Jacobs v. State*, 361 So.2d 640, 644 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979); *Beck v. State*, 365 So.2d 985, 1001 (Ala. Cr. App.), *aff'd*, 365 So.2d 1006 (Ala. 1978); *Evans v. Britton*, 472 F. Supp. at 718. If the jury convicts the defendant of a capital offense, the sentencing process then begins. Under section 13-11-3, the trial court holds a sentence hearing for the purpose of determining the appropriate sentence for the particular defendant in that specific case. The statute provides that the purpose of the sentence hearing is "to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole." *Id.* In reversing and remanding a capital case for a new sentence hearing in *Mack v. State*, 375 So.2d 476, 500-501 (Ala. Cr. App. 1978), *aff'd*, 375 So.2d 504 (Ala. 1979), the Alabama Court of Criminal Appeals described the sentence hearing required under the statute as follows:

> "The sentencing hearing is one of the most important and critical stages under Alabama's death penalty law. The guilt stage has passed. Now an experienced trial judge must consider the particularized circumstances surrounding the offense

and the offender and determine if the accused is to die or be sentenced to life imprisonment without parole. It is a due process hearing of the highest magnitude and the exclusionary rules of evidence play no part. The trial evidence must be reviewed to determine all of the aggravating circumstances leading up to and culminating in the death of the victim and then all the mitigating circumstances must be considered in determining if any outweigh the aggravating circumstances so found in the trial court's findings of fact. Unless and until this is done 'the trial judge cannot fairly weigh the aggravating and mitigating circumstances, and the appellate court cannot adequately review his sentencing decision.' "

The statutory aggravating and mitigating circumstances which the trial court considers at the sentence hearing are set out in sections 13-11-6 and 13-11-7. With one minor difference, they are identical to the statutory aggravating and mitigating circumstances in the Florida statute upheld in *Proffitt v. Florida*, 428 U.S. 242, 248 n. 6 (1976).[15] In addition, unlike the Ohio statute struck down in *Lockett v. Ohio*, 438 U.S. 586 (1978), the Alabama statute does not limit the trial judge's consideration of mitigating circumstances to those enumerated in the statute. Instead, section 13-11-3 expressly provides that, "In the hearing evidence may be presented as to any matter that the court deems relevant to sentence . . ." The Alabama appellate courts have repeatedly held that the statute provides for the consideration of non-statutory mitigating circumstances. *E.g., Cook v. State*, 369 So.2d 1251, 1256 (Ala. 1979); *Jacobs v. State*, 361 So.2d 640, 652-654 (Ala. 1978); *see also, Evans v. State*, 361 So.2d 654, 664 (Ala. Cr. App. 1977), *aff'd*, 361 So.2d 666 (Ala. 1978), *cert. denied*, 440 U.S. 930 (1979).

The importance of the sentencing hearing and the

[15]The only difference is that Alabama's fourth aggravating circumstance omits the crimes of arson, aircraft piracy, and bombing from the list of felonies it contains.

consideration of non-statutory mitigating circumstances for the issue at hand is illustrated by the case of *Neal v. State*, 372 So.2d 1331 (Ala. Cr. App. 1979), *cert. denied*, 372 So.2d 1348 (Ala. 1979). In that case the defendant, like the petitioner in the present case, was convicted of robbery during the course of which the victim was intentionally killed. The capital crime also involved rape and was particularly heinous and atrocious. *Neal v. State*, 372 So.2d at 1347 (Decarlo, J., concurring) ("this debauchery and murder"); *id.* (Bowen, J., concurring) ("the savage and cold-blooded nature of this crime"). Nonetheless, the trial court sentenced the defendant to life imprisonment without parole instead of to death. In determining that that was the appropriate sentence, the trial court reviewed the evidence upon which the defendant was convicted and independently weighed it. After doing so, the trial court found as a non-statutory mitigating circumstance that:

> " 'While there was sufficient evidence for the jury to find Eddie Barnard Neal guilty, there was not the depth of evidence against him which this court must insist upon for the penalty of death to be invoked.' " 372 So.2d at 1346.

The trial court's sentencing determination can thus act as an additional safeguard to ensure that even if there is sufficient evidence to justify the jury in finding beyond a reasonable doubt that the defendant is guilty of the capital crime, no defendant will be sentenced to death unless the "depth of evidence against him" also convinces the trial court judge that the death penalty is warranted. Contrary to the assertions on pp. 16, 18, and 53 of petitioner's brief, in determining the sentence the trial court is not bound by any findings of fact implicit in the jury's verdict. See pp. 57-59, *infra*.

In *Evans v. Britton*, *supra*, the court rejected the argument that the preclusion of lesser included offenses might result in the wrongful execution of a defendant guilty of only a lesser included non-capital offense. In doing so, the court observed that adequate statutory safeguards

existed to prevent that. 472 F. Supp. at 715.

C. Juries in Capital Cases Tried Under the Alabama Statute Can be Trusted Not to Convict a Defendant Unless Convinced Beyond a Reasonable Doubt of His Guilt of the Capital Offense

The jury in this case was properly instructed to acquit the petitioner unless it was convinced beyond a reasonable doubt of each element of the capital offense (A. 4-5, 10-11, 13-14). Petitioner's argument is in essence that a jury cannot be trusted to follow those instructions. In *Parker v. Randolph*, 99 S.Ct. 2132, 2139 (1979) (plurality opinion of Rehnquist, J., joined by Burger, C.J., Stewart, and White, J.J.), this Court observed in regard to our system of trial by jury that:

> "A crucial assumption underlying that system is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed . . ."

As Mr. Justice White, joined by Mr. Chief Justice Burger and Mr. Justice Rehnquist, said in *Jurek v. Texas*, 428 U.S. 262, 279 (1976), "it should not be assumed that jurors will disobey or nullify their instructions." Mr. Chief Justice Burger has recognized "our basic trust in lay jurors as the keystone of our system of criminal justice," and has warned against casting doubt on the basic integrity of the jury system. *Furman v. Georgia*, 408 U.S. at 389, 402 (Burger, C.J., dissenting). Petitioner's argument does cast doubt on the basic integrity of our jury system, because it assumes that jurors will violate their oath and disobey their instructions, and especially because it assumes that they will do so in a capital case. In rejecting this same argument from a different petitioner, the court in *Evans v. Britton*, *supra*, said:

> "This Court would rather presume that jurors, especially in a capital case, will be true to their oaths and return verdicts in accordance with the facts and the law, rather than adopting petitioner's view that the jury can be expected to abdicate its responsibility. Indeed, to follow the petitioner's reasoning the Seventh Amendment would become a mockery in any criminal case, since no juror could be presumed to abide by his or her oath in considering issues presented." 472 F. Supp. at 715 (footnote omitted).

It is true that this Court has recognized that in some contexts, such as those involved in *Jackson v. Denno*, 378 U.S. 368 (1974), and in *Bruton v. United States*, 391 U.S. 123 (1968), the "practical and human limitations of the jury system," 391 U.S. at 135, override "the theoretically sound premise that a jury will follow the trial court's instructions." *Parker v. Randolph*, 99 S.Ct. at 2140 (plurality opinion). But this Court has also recognized that such cases are the exceptions, and "[t]he 'rule' — indeed the premise upon which the system of jury trials functions under the American judicial system — is that juries can be trusted to follow the trial court's instructions." *Id.* at 2140 n. 7. As the dissent in *Parker v. Randolph*, *supra*, noted, "the controlling question must be whether it is realistic to assume that the jury followed the judge's instructions . . ." 99 S.Ct. at 2147 (dissenting opinion of Stevens, J., joined by Brennan and Marshall, J.J.).

To support a negative answer to that question petitioner relies heavily on *Keeble v. United States*, 412 U.S. 205, 213 (1973), a case in which the court interpreted a federal statute as permitting convictions on lesser included offenses thereby avoiding what it termed the "difficult constitutional questions" which would otherwise be raised. The majority opinion in that case does refer to "the substantial risk that the jury's practice will diverge from theory" in that context. *Id.* at 212. It also opines that, "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense,

the jury is likely to resolve its doubts in favor of conviction." *Id.* at 212-213 (emphasis in original). But the teaching of *Parker v. Randolph*, *supra*, is that whether a jury can be trusted or not in a particular circumstance must be decided with reference to the specifics of the individual circumstance. The alteration of one specific factor in two apparently similar circumstances can cause, "the constitutional scales to tip the other way." *Parker v. Randolph*, 99 S.Ct. at 2140 (plurality opinion).

The preclusion of lesser included offenses in the present case is different from that in *Keeble* and that difference tips the scales the other way. First of all, *Keeble* was a non-capital case whereas the present case involves the preclusion of lesser included non-capital offenses in a capital case. At first glance, that difference would seem to support petitioner's position, since this Court has recognized a greater need for reliability in capital cases. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). But important cases should not be decided on a glance. More careful consideration compels the conclusion that the fact that this is a capital case actually helps ensure the reliability of the fact-finding process and removes any possibility that preclusion will result in a wrongful conviction for the higher or capital offense. This is true because, "Juries, of course, have always treated death cases differently . . ." *Furman v. Georgia*, 408 U.S. at 286 (Brennan, J., concurring). As was discussed on pp. 17-20, *supra*, the difference is that juries are extremely cautious in capital cases and they resolve any and all doubts against conviction when death is the penalty. This Court has relied in the past upon the predictability of such jury behavior in capital cases, see pp. 20-21, *supra*, and it should do so again in the present case.

The second major difference between *Keeble v. United States*, *supra*, and the present case is that there were no special statutory procedures which guarded against a

wrongful conviction of the higher offense in *Keeble*, but there are in the present case, see pp. 21-27, *supra*. For example, in *Keeble* the jurors were not told that they could refuse to agree on a verdict or on the penalty which would cause a mistrial and make it possible for the defendant to be reindicted for a lesser offense, but in the present case they were so instructed, see pp. 22-24, *supra*.

It is simply unrealistic to assume that the jury in the present case, or in any other capital case tried under Alabama's statute, would disobey their oaths and instructions, ignore the mistrial option, and wrongfully convict a defendant of a capital offense. Not only is such an assumption contrary to all the evidence and findings about jury behavior in capital cases, but it also ignores the practical effect of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Since capital juries are selected according to the dictates of that decision, they are especially unlikely to convict of a capital offense in spite of a reasonable doubt and return a verdict form which fixes the penalty at death.[16]

The statistics cited on p. 24 of petitioner's brief do not establish that juries have disregarded their instructions and wrongfully convicted defendants. Petitioner claims that a 96% conviction rate is "astonishing," but there is no evidence at all that the convictions referred to were based on anything but evidence proving beyond a reasonable doubt the capital offense charged. The lesser included offense doctrine developed to protect prosecutors from suffering acquittals when they failed to establish all the

[16]On page 23 of his brief petitioner quotes from a portion of Justice Shores' dissent in *Jacobs v. State*, 361 So.2d 640, 651-652 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979). In the portion omitted from the first sentence of that quotation, Justice Shores admitted that her "suggest[ion]" was not supported by the historical data. 361 So.2d at 651. Relying on historical data, a majority of the Alabama Supreme Court remarked in the same case, "We are further convinced that trial juries will consider the serious consequences of a guilty verdict and will either refuse to fix the penalty at death [causing a mistrial], or will acquit the defendant." 361 So.2d at 643, 645 (majority opinion).

elements of a higher offense. *E.g., Keeble v. United States*, 412 U.S. at 208. Given the fact that prosecutors know that they cannot rely on the protection of that doctrine in cases brought under Alabama's capital punishment statute, it is not suprising that they have been extremely cautious about prosecuting capital indictments. Nor is it surprising that only the strongest cases are prosecuted as capital cases. *See, Gregg v. Georgia*, 428 U.S. 153, 225 (1976) (concurring opinion of White, J., joined by Burger, C.J., and Rehnquist, J.) ("the standards by which [prosecutors] decide whether to charge a capital offense will be the same as those by which the jury will decide the questions of guilt and sentence.")

If lesser included offenses were not precluded in capital cases, the prosecutor would have nothing to lose in bringing a capital indictment, but with preclusion he literally has everything to lose. No prosecutor likes to lose cases. In a case in which the prosecutor has any reason to doubt his ability to prove beyond a reasonable doubt each and every element of the capital offense, he is free to obtain a non-capital indictment, and he can be expected to do so. Even after a capital indictment is obtained, the prosecutor is free to re-indict on a non-capital charge and prosecute it instead of the original capital indictment, and that has happened.[17]

Alabama's statute defines fourteen different crimes as capital. *Code of Alabama* 1975, §13-11-2(a). The fact that only fifty capital cases had been tried during the two and three-quarter years covered by the statistics,[18] is further

[17]The statistics on p. 24 of petitioner's brief are taken from Respondent's Brief in Opposition to a Petition for a Writ of Certiorari, Jacobs v. Alabama (U.S. October Term, 1978, No. 78-5696), at 10, 35. That same brief contained in its Appendix A a list of cases in which capital indictments had been returned and their dispositions as of that time (December, 1978). Pages 3, 6, 11, and 12 of that appendix show that in at least four cases prosecutors began with capital indictments but subsequently obtained re-indictments for non-capital offenses.

[18]The effective date of the capital punishment statute was March 7, 1976, section 13-11-9, and the statistics referred to were filed on December 13, 1979. See n. 17, above.

evidence that only the strongest capital cases are prosecuted as capital cases.

In summary, petitioner has failed to establish that a jury cannot be trusted to properly perform its function under the Alabama capital punishment statute. In the words of the court in *Evans v. Britton*, 472 F. Supp. at 716, he "piles a supposition on top of an assumption to achieve the position that the burden of proof is lessened. This is simply too conjectural to bear consideration by the Court."

II.

THIS COURT HAS NEVER HELD THAT THE PRECLUSION OF LESSER INCLUDED OFFENSES IS UNCONSTITUTIONAL

This Court has never held that the preclusion of lesser included offenses violates the Due Process Clause or any other constitutional provision, and it should not do so in this case. While the majority opinion in *Keeble v. United States*, 412 U.S. 205 (1973), held that the defendant in that federal prosecution was "entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater," that holding was expressly based upon Federal Rule of Criminal Procedure 31(c), cases espousing the rule in federal prosecutions, and on an interpretation of the federal statute involved in that case. 412 U.S. at 208-213. The majority opinion did state that preclusion of lesser included offenses in that context would have raised difficult constitutional questions, 412 U.S. at 213, but the present context is materially different because there is greater assurance about the reliability of fact-finding in this case. See pp. 30-31, *supra*. In any event, the *Keeble* majority did not purport to answer the constitutional issues and instead expressly limited its decision to a holding that the federal act involved did not require preclusion. 412 U.S. at 214. The majority also noted that

the Court had never held that preclusion of lesser included offenses was a violation of due process. *Id.* at 213.[19]

In *Keeble*, Mr. Justice Stewart wrote a dissenting opinion which was joined by Mr. Justice Powell and Mr. Justice Rehnquist. 413 U.S. at 215-217. Those three Justices interpreted the federal statute involved as not permitting a lesser offense instruction, *id.*, even though the evidence supported such an instruction in that case. 412 U.S. at 208. Petitioner says that the *Keeble* dissent did not dispute "the majority's analysis of the protection accorded by the option of a lesser offense verdict to defendant's interest in reliable jury fact-finding," petitioner's brief at 20 n. 17. Instead, petitioner argues that the dissent merely held that the lesser offense was precluded as a jurisdictional matter. The dissenters did note that the reason the lesser included offense instruction was precluded was that the statute conveying federal court jurisdiction over the higher offense did not permit it. Since no one has ever contended that a federal statute could override the Due Process Clause, at least implicit in the dissenters' position is a view that the Constitution does not require a lesser offense instruction in every case where the evidence would support

[19]Contrary to the assertions on pp. 30-31 of petitioner's brief, the lower federal courts have not interpreted *Keeble* as constitutionalizing Federal Rule of Criminal Procedure 31(c). *Joe v. United States*, 510 F.2d 1038, 1042 (10th Cir. 1975) (". . . Keeble avowedly did not establish any new constitutional doctrine."), *United States v. Comer*, 421 F.2d 1149 (D.C. Cir. 1970), and *United States v. Tsansas*, 572 F.2d 340, 346 (2nd Cir.), *cert. denied*, 435 U.S. 995 (1978), all involved federal prosecutions and application of that federal rule. *United States ex. rel. Matthews v. Johnson*, 503 F.2d 339 (3rd Cir. 1974), *cert. denied sub nom., Cuyler v. Matthews*, 420 U.S. 952 (1975), simply held that it was unconstitutional to leave the question of whether to give lesser included offense instructions in the totally unregulated discretion of the trial court judge. The part of the district court decision petitioner cites from *United States ex rel. Powell v. Pennsylvania*, 294 F. Supp. 849, 852 (E.D. Pa. 1968), *appeal dismissed*, 425 F.2d 267 (3rd Cir. 1970), is purest dictum. On the other hand, the rejection of petitioner's arguments in *Evans v. Britton*, 472 F. Supp. 707, 714-717 (S.D. Ala. 1979), is not dictum.

a conviction for the lesser offense.[20]

Therefore, if there is any constitutional holding in *Keeble*, it is the implicit holding of the three dissenting Justices, a holding contrary to petitioner's position in the present case. The *Keeble* majority expressly did not decide whether the preclusion of lesser included offenses violated the Due Process Clause, and it did note that the Court had never answered that question.

Petitioner also relies on the nineteenth century cases of *Winston v. United States*, 170 U.S. 303 (1899), *Stevenson v. United States*, 162 U.S. 313 (1896), *Wallace v. United States*, 162 U.S. 466 (1896), and *Hopt v. Utah*, 110 U.S. 574 (1884). All involved federal or territorial prosecutions and were decided on the basis of statutory law. None purported to declare any constitutional requirement for instructions on lesser included offenses. Contrary to the assertion on p. 46 of petitioner's brief, neither the *Stevenson* case nor any other case establishes that preclusion of lesser included offenses violates a defendant's right to a fair trial. Instead, *Stevenson* held that preclusion was improper in a federal prosecution because the statutory predecessor of Federal Rule of Criminal Procedure 31(c) said it was. *Stevenson v. United States*, 162 U.S. at 315. The case of *Winston v. United States*, 172 U.S. 303 (1899), is the last in the line of nineteenth century cases cited by petitioner, and it summarized the cases simply as, "illustrating the steadfastness with which the full and free exercise by the jury of powers *newly conferred upon them by statute* in this matter has been upheld . . ." 172 U.S. at 312 (emphasis added).

The same is true of *Sansome v. United States*, 380 U.S. 343 (1965), and *Berra v. United States*, 351 U.S. 131 (1956).

[20]Mr. Justice Stewart's dissenting opinion did note that, "The Court does not reach any other possible ground for reversing this conviction, and, accordingly, neither do I." 412 U.S. at 215 n. 1. That remark appears to be a reference to the contentions of the petitioner in that case that his conviction was also due to be reversed because of a confession issue and an apparent defect in the indictment. *See*, 412 U.S. at 207 n. 4, 213 n. 13.

The dicta petitioner cites from those cases refers to the requirements of Federal Rule of Criminal Procedure 31(c) which does not apply in state courts. The court in *Keeble v. United States*, 412 U.S. at 213, recalled the limited nature of the holdings in those cases when it recognized that the Court had never held preclusion to violate due process.

Gregg v. Georgia, 428 U.S. 153 (1976), did not hold that the preclusion of lesser included offenses was unconstitutional. The petitioner in *Gregg* argued that there were so many opportunities for discretionary action inherent in the Georgia capital punishment statute that the arbitrariness and capriciousness condemned in *Furman* still remained. 428 U.S. at 198-199. Prosecutorial discretion, the de facto sentencing discretion inherent in the availability to the jury of lesser included offenses, and the discretionary exercise of executive clemency were pointed out as possible sources of arbitrariness and capriciousness in capital sentencing. 428 U.S. at 199. Rejecting petitioner's argument that these opportunities for discretion rendered the statute unconstitutional, the joint opinion held that *Furman* required only that the risk of abritrariness and capriciousness be minimized by objective sentencing standards. 428 U.S. at 199. It noted that a decision to afford an individual defendant mercy did not violate the Constitution. *Id.* The opinion contains some statements in a footnote which the petitioner in the present case misconstrues to support his position.

Following up its observation that a system is not unconstitutional simply because it provides opportunities for an individual defendant to be afforded mercy, the opinion notes in the footnote in question that a contrary holding would effectively outlaw capital punishment by placing unrealistic conditions on its use. 428 U.S. at 199 n. 50. In explanation, the opinion says that a system which sought to end all sources of discretion would have to forbid executive clemency and plea bargaining, would have to require prosecutors to charge a capital offense every time

one had even arguably been committed, and it would also have to require that when a jury refused to convict even though the evidence supported the capital charge its verdict of acquittal be reversed. *Id.* The opinion then notes that a system which did these specified things "would be totally alien to our notions of criminal justice," and it points out that reversing a jury's verdict of acquittal would be unconstitutional. *Id.* Contrary to the assertions on pp. 16, 56, and 63 of petitioner's brief, it does not say that the preclusion of lesser included offenses would be alien to our notions of criminal justice or unconstitutional. Indeed, the opinion quite conspicuously omits the preclusion of lesser included offenses from the list of actions which it says in the footnote would be alien to our notions of criminal justice and unconstitutional. *Id.*[21]

III.

THE PRECLUSION OF LESSER INCLUDED NON-CAPITAL OFFENSES BY ALABAMA'S CAPITAL PUNISHMENT STATUTE DOES NOT VIOLATE THE DUE PROCESS CLAUSE

A. The Preclusion of Lesser Included Non-Capital Offenses by Alabama's Statute Does Not Undermine the Proof Beyond a Reasonable Doubt Standard

This Court held in *In re Winship*, 397 U.S. 358 (1970), that the requirement of proof beyond a reasonable doubt is an essential right protected by the Due Process Clause. Seeking that same status for the availability of lesser included offenses, petitioner's principal contention is that the preclusion of lesser included offenses undermines the requirement of proof beyond a reasonable doubt and

[21]Since the Georgia statute did not preclude lesser included offenses, any observation about the subject in the footnote that petitioner relies upon would be dictum anyway. Mr. Justice Frankfurter once noted that, "[a] footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine," *Kovacs v. Cooper*, 336 U.S. 77, 90-91 (1949) (concurring opinion), and that would seem especially true when the footnote contains dictum in an opinion joined by only three members of the Court.

thereby jeopardizes the reliability of fact-finding. The strategy of petitioner's argument is to elevate the availability of lesser included offenses to constitutional status by piggybacking it onto the reasonable doubt standard.

The Alabama Legislature incorporated into the capital punishment statute special safeguards to strengthen the reliability of the fact-finding process and to ensure that a defendant would not be convicted unless the jury was convinced beyond a reasonable doubt of his guilt of the capital offense. See pp. 21-28, *supra*. Regardless of the motives behind the preclusion clause,[22] its adoption reflects a considered legislative judgment that the availability of lesser included non-capital offenses is not essential to enforcing the proof beyond a reasonable doubt standard under a capital statute that contains those safeguards. Petitioner's argument to the contrary is based on speculative assumptions. Not only does petitioner ignore the special statutory safeguards built into Alabama's statute, but he also ignores long-standing perceptions of this Court about the behavior of juries in capital cases. See pp. 20-21, *supra*.

In *Johnson v. Louisiana*, 406 U.S. 356, 359-360 (1972), this Court rejected the argument that the jury unanimity requirement was essential to give substance to the reasonable doubt standard. In doing so, this Court said, "before we alter our own long-standing perceptions about jury behavior and overturn a considered legislative judgment that unanimity is not essential to reasoned jury verdicts, we must have some basis for doing so other than unsupported assumptions." 406 U.S. at 362. Petitioner in the present case offers unsupported assumptions. The historical evidence concerning jurors' behavior in capital cases, this Court's previous perceptions of and reliance on the predictability of that behavior, and the special safeguards built into Alabama's statute all compel the

[22]The legislative purpose behind the preclusion of lesser included offenses is discussed on pp. 45-49, *infra*.

conclusion that the availability of lesser included offenses is not necessary to give substance to the proof beyond a reasonable doubt standard. See pp. 17-31, *supra*. Accordingly, lesser included offenses cannot be elevated to the status of an essential of due process by piggybacking them onto the reasonable doubt standard.[23]

B. The History of Lesser Included Offenses Does Not Establish a Due Process Right to the Availability of Them

Petitioner argues that the history of lesser included offenses and their availability in other contexts and jurisdictions justifies recognizing the lesser included offense option as a fundamental due process right. Petitioner's reliance on history fails for two reasons. First, history does not show that the lesser included offense doctrine developed to protect any rights or interests of defendants. Instead, history shows that the doctrine was designed and developed to assist the prosecution when the evidence failed to establish some element of the offense charged. *E.g., Keeble v. United States*, 412 U.S. 205, 208 (1973); *Kelly v. United States*, 370 F.2d 227 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 913 (1967); *United States v. Markis*, 352 F.2d 860, 866 (2nd Cir. 1965).

The second reason why the history of lesser included offenses fails to establish that their availability is a due process right is that history alone does not define due process. For example, in *Johnson v. Louisiana*, 406 U.S.

[23]Nor can the preclusion of lesser included offenses be equated with an irrebuttable presumption as petitioner attempts to do in n. 27 on p. 32 of his brief. The Alabama statute does not irrebuttably presume that a defendant indicted for a capital offense is not guilty of some lesser included offense. Instead, the statute simply operates to require that the defendant be acquitted of the capital charge if he is guilty only of a lesser offense or of no offense at all. Using petitioner's approach, which goes beyond the cases that he cites in support of it, virtually every rule of law is unconstitutional as an irrebuttable presumption. For example, using petitioner's terminology, a statute of limitations is "in effect" an irrebuttable presumption against a finding of guilt of a crime committed outside the period prescribed in the statute of limitations.

356 (1972), this Court rejected the argument that due process required a unanimous jury and it did so in spite of the fact that the unanimous jury was "embedded in our legal history," *id.* at 382 n. 1 (Douglas, J., dissenting), and originated long before the American Revolution, as early as the 14th century. *Id.* at 383 n. 2. *See also, Apodaca v. Oregon*, 406 U.S. 404, 407 & n. 2, 408 (1972). Another example of a historically well established device that has been denied constitutional status is the twelve-member jury. In *Williams v. Florida*, 399 U.S. 78 (1970), this Court held that States were not constitutionally required to use twelve-member juries even though that had been the fixed number of jurors since the middle of the 14th century, *id.* at 87 n. 19, 89, even though earlier decisions had assumed that number was constitutionally required, *id.* at 90-91, and even though the federal courts and virtually all the States used that number. *Id.* at 103 n. 50; *Id.* at 136-137 (Harlan, J., concurring).

In *Johnson v. Louisiana, supra, Apodaca v. Oregon, supra*, and *Williams v. Florida, supra*, this Court rejected a purely historical approach and employed a functional analysis instead. Using the same type of analysis in the present case, the availability of lesser included offenses is not constitutionally required because, at least under Alabama's capital punishment statute, it is not necessary to give substance to the reasonable doubt standard and is not necessary to ensure the reliability of the fact-finding process. See pp. 17-33, *supra*.[24]

[24]The argument in n. 22 on p. 26 of petitioner's brief attempts to cast the issue in Sixth Amendment terms by arguing that the preclusion of lesser included offenses undermines the impartiality of the jury. It seems a bit strained to apply the language of partiality or impartiality to the present situation. However, if that language is to be used, then for the same reasons that preclusion does not undermine the proof beyond a reasonable doubt standard and jeopardize the reliability of the fact-finding process, it also does not produce verdicts that are the result of partiality.

C. The Use of the Lesser Included Offense Option in Other Contexts and Jurisdictions Does Not Establish a Due Process Right to the Availability of It

The fact that the lesser included offense option is available in virtually all other contexts and jurisdictions does not mean that due process requires it. The lesser included offense device developed not in response to due process concerns but for the purpose of assisting the prosecution, see p. 39, *supra*, and its widespread use may well reflect nothing more than its usefulness for that purpose. In any event, the purpose of the Due Process Clause is not to force on any state a kind of uniform code of criminal procedure based upon the procedure of other states or of the federal government. Many cases recognize this principle.

In *Patterson v. New York*, 432 U.S. 197, 211 (1977), this Court held that the fact a majority of states had assumed the burden of disproving affirmative defenses did not mean that those states which followed a different practice violated due process. *See also, Williams v. Florida*, 399 U.S. 78, 103 & n. 50, 136-137 (1970) (holding that Florida's provision of six-member juries in all non-capital felony cases did not violate the Sixth Amendment even though the federal courts and forty-five states use twelve-member juries in all or most felony cases). Nor does the principle change when a state stands alone.

Only one state, Louisiana, authorizes a conviction on a 9 to 3 vote of the jury, *Williams v. Florida*, 399 U.S. at 137-138 (concurring opinion and appendix of Harlan, J.), yet this Court held in *Johnson v. Louisiana*, 406 U.S. 356 (1972), that despite the singularity of Louisiana's practice it was not violative of the Due Process Clause. Likewise, *Leland v. Oregan*, 343 U.S. 790 (1952), held that Oregon's rule requiring that a defendant prove the defense of insanity beyond a reasonable doubt was not a violation of due process. In *Patterson v. New York*, 432 U.S. 197, 204-

205 (1977), this court recognized the continuing validity of the *Leland* decision even though it noted that Oregon was the only state that placed such a requirement on the defendant.

These cases reflect important principles of federalism. As this Court said in *Addington v. Texas*, 99 S. Ct. 1804, 1812 (1979), "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." The problem of reducing arbitrariness and capriciousness in capital sentencing has vexed legislators and members of this Court. Alabama's statutory system of precluding lesser included offenses while providing safeguards to insure the reliability of the fact-finding process represents a considered judgment about how to solve that problem. See pp. 45-50, *infra*. While Alabama's solution may be unique and may not itself be constitutionally required, that does not mean that it is unconstitutional. Since Alabama's system does not undermine the proof beyond a reasonable doubt standard and does not jeopardize the reliability of fact-finding in capital cases, Alabama should not be forced into a common, uniform mold. This is particularly true since the configuration of that mold seems to change so frequently.

IV.

THIS COURT SHOULD NOT CONSIDER PETITIONER'S EQUAL PROTECTION CLAIM BECAUSE HE DID NOT RAISE IT BELOW

Petitioner's claim that the preclusion of lesser included non-capital offenses by Alabama's statute violates the Equal Protection Clause is raised for the first time before this Court. He did not raise the equal protection issue before the trial court (A. 55), nor did he raise it in his appeal to the Alabama appellate courts. Neither the Alabama Court of Criminal Appeals nor the Alabama Supreme Court decided the equal protection issue (A. 17-52, 53-54).

When a state appellate court fails to pass on a particular

federal question, this Court should presume that it was due to the want of proper presentation, unless the aggrieved party can show to the contrary. *Fuller v. Oregon*, 417 U.S. 40, 50 n. 11 (1974); *Street v. New York*, 394 U.S. 576, 582 (1969). Even without such a presumption, petitioner's failure to raise the equal protection issue is clear from the Alabama Court of Criminal Appeals' opinion which lists all of the claims he did present to it (A. 38-39), and from the Alabama Supreme Court's statement that petitioner raised only one issue, a state law issue, before that court (A. 53).

On p. 14 of his brief, petitioner states that in his petition to the Alabama Supreme Court he reiterated the federal constitutional contentions he had made to the Alabama Court of Criminal Appeals. Even if he did, petitioner did not contend to the Court of Criminal Appeals that the statute violated the Equal Protection Clause. In any event, an examination of the petition to the Alabama Supreme Court, which is not part of the record before this Court, reveals that petitioner's only reference to the United States Constitution was a bare assertion that the Alabama statute "violates provisions of the Constitution under the 8th, 6th and 14th Amendments to the Constitution of the United States and is in fact a mandatory death sentence." Petition for Writ of Certiorari, Beck v. State (Alabama Supreme Court No. 77-530) at 2.

In his brief to the Alabama Supreme Court, petitioner abandoned all federal claims and argued only an issue involving the state constitution. Brief on Behalf of Petitioner, Beck v. State (Alabama Supreme Court No. 77-530) (A. 53).[25] The first time that petitioner even mentioned the words "equal protection" was before this Court.

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[25]In deciding that state constitutional issue which involved sentencing, the Alabama Supreme Court cited its previous decision in *Jacobs v. State*, 361 So.2d 640 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979), which upheld the statute's sentencing procedures. The *Jacobs* decision did not address any equal protection issue.

Because petitioner did not present the equal protection issue to the courts below and it was not decided by them, this Court need not decide it, *Moore v. Illinois*, 408 U.S. 786, 799 (1972), should not decide it, *Fuller v. Oregon*, 417 U.S. 40, 50 n. 11 (1974), and has no jurisdiction to decide it. *Street v. New York*, 394 U.S. 576, 581-582 (1969); *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945); *see* 28 U.S.C. §1257 (2) and (3).

V.

THE PRECLUSION OF LESSER INCLUDED NON-CAPITAL OFFENSES BY ALABAMA'S STATUTE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

A. Although Not Constitutionally Required, the Preclusion of Lesser Included Non-Capital Offenses is a Legitimate and Permissible Means of Reducing Arbitrariness and Capriciousness in Capital Sentencing

The decisions in *Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (joint opinion), *Proffitt v. Florida*, 428 U.S. 242, 254 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.) [hereinafter cited as "joint opinion"], and *Jurek v. Texas*, 428 U.S. 262, 274 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.) [hereinafter cited as "joint opinion"], establish that the amount of, or risk of, arbitrariness and capriciousness in capital sentencing may be reduced to a constitutionally acceptable level without precluding lesser included non-capital offenses.[26] That holding is simply one aspect of this Court's recognition that, even after *Furman*, perfection is not required in capital sentencing. *See, e.g., Gregg v. Georgia*, 428 U.S. at 226 (concurring opinion of White, J., joined by Burger, C.J.. and Rehnquist, J.)

[26]None of those cases held that the preclusion of lesser included non-capital offenses was not permissible. Plaintiff's contention that the joint opinion in *Gregg* so held is discussed at pp. 36-37, *supra*.

("Mistakes will be made and discriminations will occur which will be difficult to explain."); *Woodson v. North Carolina*, 428 U.S. 280, 317-319 (1976) (Rehnquist, J., dissenting) (recognizing defects inherent in the Georgia, Florida, and Texas statutes). The constitutional minimum which has been enforced is, "a system that does not create a substantial risk of arbitrariness or caprice." *Gregg v. Georgia*, 428 U.S. at 203 (joint opinion); *see also, id.* at 188.

The fact that the Georgia, Florida and Texas statutes were held to meet the constitutional minimum without precluding lesser included offenses does not mean that another state cannot strive to do even better. After describing the sentencing procedures held to be acceptable in *Gregg*, the joint opinion in that case said:

> "We do not intend to suggest that only the above-described procedures would be permissible under Furman or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of Furman, for each distinct system must be examined on an individual basis. Rather, we have embarked on this general exposition to make clear that it is possible to construct capital-sentencing systems capable of meeting Furman's constitutional concerns." 428 U.S. at 195 (footnotes omitted).

Furman's constitutional concerns were that the administration of capital punishment statutes: had been "pregnant with discrimination," *Furman v. Georgia*, 408 U.S. at 257 (Douglas, J., concurring); had permitted the death penalty to be "wantonly" and "freakishly" imposed, *id.* at 310 (Stewart, J., concurring); and had resulted in the death penalty being imposed with such "great infrequency" that there was "no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not," *id.* at 313 (White, J., concurring). *Accord, id.* at 293, 305 (Brennan, J., concurring); *Gregg v. Georgia*, 428 U.S. at 188 (joint opinion).

The preclusion of lesser included non-capital cases serves to meet those concerns by removing an historically proven and logically inescapable source of discretion that can interject an amount of arbitrariness and capriciousness into capital sentencing. While *Gregg*, *Proffitt*, and *Jurek* stand for the proposition that the amount or risk of arbitrariness resulting from the availability of lesser included offenses is not so substantial as to itself violate the Constitution, Alabama should be free to decide that it can go beyond the minimum and reduce the level of arbitrariness and capriciousness even further than required.

The history of lesser included offenses demonstrates their potential as a source of de facto sentencing discretion that can lead to some degree of arbitrariness and capriciousness in the administration of capital punishment. *See, Woodson v. North Carolina*, 428 U.S. 280, 291, 293 & n. 29, 302 (1976) (plurality opinion); *id.* at 311-313 (Rehnquist, J., dissenting); *McGautha v. California*, 402 U.S. 183, 199 (1971); *Furman v. Georgia*, 408 U.S. at 246-247 (1972) (Douglas, J., concurring). The principal reason the mandatory death penalty statute in *Woodson v. North Carolina, supra*, "simply papered over the problem of unguided and unchecked jury discretion," 428 U.S. at 302-303 (plurality opinion), was that it permitted the jury to convict on lesser included non-capital offenses. All that a North Carolina jury had to do to avoid the imposition of the death penalty under that statute was to return a verdict for second degree murder. The same was true of the Louisiana statute struck down in *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976), where the plurality reasoned that the availability of lesser included offenses "plainly invite[d] the jurors to disregard their oaths and choose a verdict of a lesser offense whenever they feel that the death penalty [was] inappropriate," thereby interjecting an element of capriciousness. 428 U.S. at 334-335 (plurality opinion). The prediction upon which *Roberts* is bottomed is that at least

some Louisiana juries would convict of only a lesser included offense even though all the jurors were convinced that the greater capital offense had been proven. *Woodson v. North Carolina*, 428 U.S. at 314 (Rehnquist, J., dissenting).

While the use of lesser included offenses as a mechanism of de facto sentencing discretion is more obvious in mandatory statutes and will more frequently lead to arbitrariness and capriciousness under such statutes, the same result can occur under non-mandatory statutes. As Mr. Chief Justice Burger noted in *Furman*, "there is no assurance that sentencing patterns will change so long as juries are possessed of the power to . . . bring in a verdict of guilt on a charge carrying a lesser sentence." *Furman v. Georgia*, 408 U.S. at 401 (Burger, C.J., dissenting).[27] This is true, because whenever a statute, "gives the jury the power to find guilt in a lesser degree, the law leaves the jury great leeway." *Witherspoon v. Illinois*, 391 U.S. 510, 529 (1968) (separate opinion of Douglas, J.). That leeway results in part from what the *Woodson* plurality called the "amorphous nature of the controlling concepts of willfulness, deliberateness, and premeditation," which are usually employed to separate first degree murder from murder in the second degree, *Woodson v. North Carolina*, 428 U.S. at 290-291, and which leave room for the play of jurors' prejudices and emotions. The potential for lesser included offenses being used as a de facto outlet for sentencing considerations is exacerbated by the practical effect of the *Witherspoon* decision. By holding out for a conviction on a non-capital lesser included offense even when they are convinced that the defendant has committed the capital offense, jurors who have concientious scruples

[27] In that same opinion, Mr. Chief Justice Burger went on to express displeasure with the prospect of a mandatory death penalty statute precluding lesser included offenses and resulting in a system in which the death sentence could only be avoided by a verdict of acquittal. 408 U.S. at 401. Alabama's statute is not a mandatory death penalty statute, and a convicted capital defendant can receive a sentence other than death. See pp. 25-27, *supra*, and pp. 54-57, *infra*.

against the death penalty can avoid any possibility that that penalty will later be imposed by the sentencing authority. This element of capriciousness is especially likely to infect the guilt stage where, as here, the sentencing authority is the judge and not the jury, see pp. 25-26, *supra*.

A state has abundant reasons for choosing to make the trial court judge the sentencing authority. The inexperience of jurors in dealing with sentencing information is a problem inherent in any system which gives jurors a voice in the sentencing determination. *Gregg v. Georgia*, 428 U.S. at 192 (joint opinion). Because trial court judges are more experienced in sentencing, judicial sentencing in capital cases has the potential for achieving greater rationality and consistency of results. *Proffitt v. Florida*, 428 U.S. at 252 (joint opinion); *accord*, *Beck v. State*, 365 So.2d 985, 1001 (Ala. Cr. App. 1978), *aff'd*, 365 So.2d 1006 (Ala. 1978) (A. 43). It also helps make appellate review of sentencing decisions, which was found so constitutionally valuable in *Gregg* and *Proffitt*, more effective by providing a detailed objective record of the factors considered by the sentencer at the trial level.

The preclusion of lesser included offenses is more important when the judge is the sentencing authority than when the jury sentences in a capital case. If the jury has a substantial or decisive say in the sentencing decision, as in Florida or Georgia, then it is less likely that the jury's determination of guilt will be infected by the desire of any jurors to avoid imposition of the death penalty. Those jurors who oppose the death penalty can vent their feelings during the sentencing stage. However, if a state elects to pursue the advantages of judicial sentencing to the utmost and thereby maximize consistency and rationality in capital sentencing, as Alabama has done, then those jurors who oppose capital punishment in a particular case or in general cannot use the sentencing stage to prevent imposition of the death penalty. Such jurors can work against the imposition of the death penalty only during the guilt determination stage.

The availability of lesser included offenses not only makes that possible, but also relatively easy. Jurors who are motivated by opposition to the death penalty are much more likely to convince their fellow jurors to convict a guilty capital defendant of a lesser included offense carrying a lengthy prison sentence than they are to convince their fellow jurors, even if they can convince themselves, to acquit the guilty capital defendant. Whenever a defendant guilty of a capital offense escapes conviction for that offense through the lesser included offense mechanism, some capriciousness in overall sentencing results. The preclusion of lesser included non-capital offenses is thus a rational means of striving for the greater consistency promised by a system of judicial sentencing in capital cases.

There is an additional reason why the preclusion of lesser included offenses is valuable under Alabama's statute. The statute requires that any verdict of the jury convicting the defendant of a capital offense, "fix the penalty at death." *Code of Alabama* 1975, §13-11-2(a). This requirement does not make the Alabama statute a mandatory one because the judge, who is the actual sentencing authority, may sentence a convicted capital defendant to life imprisonment without parole. See pp. 25-26, *supra*, and pp. 54-57, *infra*. The requirement that the jury verdict form "fix the penalty at death" serves the constitutionally laudable purpose of bringing home to the jury the need for great caution and helps ensure that the jury will convict of the capital offense only when it is truly convinced beyond a reasonable doubt and to a moral certainty that the defendant is guilty of it. See pp. 21-22, *supra*. Because Alabama has chosen to safeguard the reliability of fact-finding in capital cases in this manner, the preclusion of lesser included non-capital offenses is a rational means of ensuring that de facto sentencing discretion is not simply "papered over" but instead is properly limited to prevent capricious sentencing results. Other states have chosen not

to use the same procedures, but *Gregg v. Georgia*, 428 U.S. at 195 (joint opinion), noted that the statutes upheld by this Court so far are not the only permissible way to pursue the same constitutional goals, and each distinct system must be examined on an individual basis.

B. The Distinction Between Capital and Non-Capital Cases is Rationally Related to the Legitimate Purpose Served by the Preclusion of Lesser Included Offenses

Under the traditional equal protection test, a legislative classification is presumed to be valid. *E.g., Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314 (1976); *Schlib v. Kuebel*, 404 U.S. 357, 364 (1971). The classification violates the Equal Protection Clause if it is based on criteria, "wholly unrelated to the objective of the statute," *Reed v. Reed*, 404 U.S. 71, 76 (1971), but does not violate the clause if it bears some rational relationship to a legitimate state purpose. *E.g., San Antonio School District v. Rodriguez*, 411 U.S. 1, 40 (1973); *McGinnis v. Royster*, 410 U.S. 263, 270, 276 (1973); *Schlib v. Kuebel*, 404 U.S. at 364-368.

The legitimate state purpose behind the preclusion of lesser included non-capital offenses is the reduction of the risk or level of arbitrariness and capriciousness in capital sentencing by the removal of a mechanism for unguided de facto sentencing discretion. See pp. 45-49, *supra*. Since the availability of lesser included offenses in non-capital cases does not pose any risk to the consistency of capital sentencing, the differentiation between capital and non-capital cases is rational, *Evans v. Britton*, 472 F. Supp. 707, 716 (S.D. Ala. 1979), being wholly determined by the purpose of preclusion. Any argument that consistency and rationality in sentencing is not more important in capital than in non-capital cases is contrary to *Furman*.

Petitioner argues that the purpose behind preclusion is "illusory" because *Gregg* and some of its companion cases held that preclusion is not constitutionally required. That

argument wrongly assumes that Alabama intended only to meet the minimum constitutional requirements concerning capital sentencing and that any purpose above and beyond that is illegitimate. Petitioner offers no support for this assumption.[28] Where two or more purposes are possible, a legislative classification should be upheld if any one justifies it. *E.g., McGinnis v. Royster*, 410 U.S. at 276-277; *Dandridge v. Williams*, 397 U.S. 471, 486 (1970); *McGowan v. Maryland*, 366 U.S. 420, 425-427 (1961). Otherwise, no state could safely enact any legislation without expressly listing all the purposes and motives of every legislator who voted for it.

On p. 67 of his brief, petitioner argues that the distinction between capital and non-capital defendants is constitutionally defective because the availability of lesser included offenses turns "merely on the basis of the prosecutor's discretionary decision to file a capital, rather than a non-capital, charge." That argument sweeps too broadly. If it is accepted, no procedural distinction between capital and non-capital cases can ever be made, because the availability of the difference in procedure will always turn "merely on the basis of the prosecutor's discretionary decision to file a capital rather than a non-capital charge." The same logic, or lack of it, would apply to the distinction between any higher offense and its lesser included offenses.

Most of petitioner's equal protection argument is premised on his contention that the availability of lesser included offenses is a procedural safeguard the denial of

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[28]Petitioner does cite Respondent's Brief in Opposition to Petition for Writ of Certiorari, Jacobs v. Alabama (U.S. October Term 1978, No. 78-5696), but such a brief is hardly equal to a formal declaration of legislative purpose. The brief did say that preclusion helped ensure that de facto sentencing discretion did not result in capital sentencing that was inconsistent with the Constitution. *Id.* at 24. It also said that preclusion was necessary to attain the full advantages of judicial sentencing. *Id.* at 25. Both statements are true, but they do not justify a conclusion that the only purpose of preclusion was to meet minimum constitutional requirements.

which jeopardizes due process rights. That premise should be rejected for the reasons discussed previously in this brief. See pp. 17-42, *supra*. The overlap of petitioner's due process and equal protection arguments is especially obvious in his contention that strict scrutiny should be applied.

C. The Strict Scrutiny Test is Not Applicable Because the Classification Does Not Infringe a Fundamental Right

Strict judicial scrutiny of a classification is appropriate under the Equal Protection Clause only when the classification operates to the disadvantage of a suspect class or infringes upon a fundamental right. *E.g., Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17 (1973). This Court has never declared capital defendants to be a suspect class for equal protection purposes, and petitioner does not press for that proposition in his brief. Instead, petitioner's argument for strict scrutiny is based upon his contention that the preclusion of lesser included offenses infringes upon a fundamental right.[29]

As this Court held in *San Antonio School District v. Rodriguez, supra*, the only rights which are "fundamental" for purposes of invoking strict scrutiny are those which are "explicitly or implicitly guaranteed by the Constitution." 411 U.S. at 33-34. To the extent that petitioner's argument for strict scrutiny claims that the availability of lesser included offenses is itself a "fundamental right," then the argument must fail because the Constitution neither

[29]Petitioner does state in a footnote that strict scrutiny should be applied because capital defendants can be termed a "discrete and insular minority" lacking, due to their "special condition," the ability to readily invoke the "political processes ordinarily to be relied upon to protect minorities." Petitioner's brief at p. 62, n. 52. Exactly the same things can be said about prisoners, and to adopt petitioner's rationale would require that the Court apply strict scrutiny to all laws and regulations relating to prisoners.

explicitly or implicitly guarantees the availability of lesser included offenses. See pp. 33-42, *supra*. To the extent that petitioner's argument is based upon a claim that preclusion of lesser included offenses infringes his fundamental right to the proof beyond a reasonable doubt standard or to reliable fact-finding, then that argument must fail because preclusion under Alabama's statute does not undermine the beyond a reasonable doubt standard or jeopardize the reliability of fact-finding, and therefore capital defendants lose no protection under the statute. See pp. 17-33, *supra*.

The infringement upon a fundamental right component of petitioner's strict security argument assumes as its premise that for which he argues on the due process issue. By clothing his due process contentions in the guise of equal protection, petitioner would have this Court disregard the wisdom of its own words, when it said, that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio School District v. Rodriguez*, 411 U.S. at 33 (majority opinion); *accord, id.* at 59 (Stewart, J., concurring).

In summary, this Court should not consider petitioner's equal protection claim, because he did not raise it in the courts below. See pp. 42-44, *supra*. Alternatively, that claim should be rejected on the merits.

VI.

THE PRECLUSION OF LESSER INCLUDED NON-CAPITAL OFFENSES BY ALABAMA'S STATUTE DOES NOT VIOLATE THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE OF THE EIGHTH AMENDMENT

A. Preclusion Does Not Make Alabama's Statute a Mandatory Capital Punishment Statute and It Does Not Prevent Individualized Sentencing

Unlike the statutes struck down in *Woodson v. North*

Carolina, 428 U.S. 280 (1976), *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976), and *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977), the Alabama statute is not a mandatory death penalty act. A mandatory death penalty statute is one which requires that every defendant convicted of a capital offense be sentenced to death, without regard to the character and record of the individual defendant and the circumstances of the particular capital offense. *Woodson v. North Carolina*, 428 U.S. at 286-287, 304. *Roberts (Stanislaus) v. Louisiana*, 428 U.S. at 331, 333; *Roberts (Harry) v. Louisiana*, 431 U.S. at 634 n. 1, 636-637. Alabama's statute expressly provides that a defendant convicted of a capital offense may be sentenced to life imprisonment without parole instead of death, *Code of Alabama* 1975, §§13-11-3 and 13-11-4, and as of December, 1978, eighteen defendants convicted of capital offenses had in fact been sentenced to life imprisonment without parole.[30] That fact alone establishes that Alabama's statute is not a mandatory death penalty act. *Evans v. Britton*, 472 F. Supp. 707, 718 (S.D. Ala. 1979).

On p. 54 of his brief, petitioner quotes a passage from Mr. Chief Justice Burger's dissenting opinion in *Furman*. In the passage quoted, Mr. Chief Justice Burger stated that he would have preferred that the Court have abolished capital punishment if the only alternative was a statute which coupled mandatory sentencing with the preclusion of lesser included offenses so that "the death sentence could only be avoided by a verdict of acquittal." 408 U.S. at 401

[30]Page 24 of petitioner's brief cites Respondent's Brief in Opposition to Petition for Writ of Certiorari, Jacobs v. Alabama (U.S. October Term, 1978, No. 78-5696), at 10, 35, for the fact that of the first 45 defendants who had been convicted of a capital offense after pleading not guilty and had been sentenced, 37 had been sentenced to death and 8 to life imprisonment without parole. The appendix of that same brief reveals that another 10 defendants had been sentenced to life imprisonment without parole after being convicted of a capital offense following a plea of guilty. The brief and appendix were filed on December 13, 1978. See also pp. 64-65, *infra*.

(Burger, C.J., dissenting). Petitioner's reliance on that passage in the present case is misplaced, because Alabama's statute is not a mandatory death penalty act and a verdict of acquittal is not the only way to avoid a sentence of death under it.[31]

On pp. 53 and 57 of his brief, petitioner argues that preclusion is contrary to *Woodson* and *Lockett* because, he says, it prevents juries from focusing on "the circumstances of the particular offense." *Woodson* and *Lockett* held that it was unconstitutional to prevent the sentencing authority from considering "the circumstances of the particular offense" and other factors in reaching a sentence decision, but neither of those two cases nor any other case has held that the jury must be the sentencing authority. *See, Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (joint opinion) ("This Court . . . has never suggested that jury sentencing is constitutionally required."); *Lockett v. Ohio*, 438 U.S. 586, 633 (1978) (Rehnquist, J., dissenting); *Richmond v. Arizona*, 434 U.S, 1323 (1977) (opinion of Rehnquist, J., as Circuit Justice); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977); *Beck v. Alabama*, 365 So.2d 985, 1001 (Ala. Cr. App.), *aff'd*, 365 So.2d 1006 (Ala. 1978) (A. 42-43).

Section 13-11-2 does require that before a defendant can be found guilty of a capital offense the jury must return a verdict form which "fix[es] the punishment at death." The purpose of that requirement is to reinforce the proof beyond a reasonable doubt standard and safeguard the reliability of the fact-finding process at the guilt stage. See pp. 21-22, *supra*. Even though the jury's verdict form must make that reference to the penalty of death, the jury does not determine the sentence. The judge and not the jury is the sentencing authority. *Code of Alabama* 1975, §§13-11-3 and 13-11-4; *accord, e.g., Jacobs v. State*, 361 So.2d 640, 644 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979); *Beck v. State*,

[31]Petitioner's contention that the joint opinion in *Gregg* states that the preclusion of lesser included offenses is alien to our notions of criminal justice or unconstitutional is discussed on pp. 36-37, *supra*.

365 So.2d 985, 1001 (Ala. Cr. App.), aff'd, 365 So.2d 1006 (Ala. 1978) (A. 43); *Evans v. Britton*, 472 F. Supp. at 718. After a jury returns a verdict convicting a defendant of a capital offense, its role ends. The guilt stage is over and the sentencing stage begins.

Section 13-11-3 requires that a sentence hearing be held for every defendant convicted of a capital offense. At the sentence hearing, "an experienced trial court judge must consider the particularized circumstances surrounding the offense and the offender and determine if the accused is to die or be sentenced to life imprisonment without parole." *Mack v. State*, 375 So.2d 476, 500-501 (Ala. Cr. App. 1978), *aff'd* 375 So.2d 504 (Ala. 1979). In making the sentence determination, the trial judge must consider the aggravating and mitigating factors set out in sections 13-11-6 and 13-11-7. Except for a minor difference, they are identical to the statutory aggravating and mitigating circumstances in the statute upheld in *Proffitt v. Florida*, 428 U.S. at 248 n. 6.[32]

Unlike the statute struck down in *Lockett v. Ohio*, 438 U.S. 586 (1978), the Alabama statute does not limit the sentencing authority's consideration of mitigating circumstances to those enumerated in the statute. Instead, section 13-11-3 provides that, "evidence may be presented as to any matter the court deems relevant to sentence," and the Alabama courts have repeatedly held that the statute provides for consideration of non-statutory mitigating circumstances. *E.g., Cook v. State*, 369 So.2d 1251, 1256 (Ala. 1979); *Jacobs v. State*, 361 So.2d 640, 652-654 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979); *see also, Evans v. State*, 361 So.2d 654, 664 (Ala. Cr. App. 1977), *aff'd*, 361 So.2d 666 (Ala. 1978), *cert. denied*, 440 U.S. 930 (1979).

Because preclusion does not mean that every defendant convicted of a capital offense is sentenced to death, and because it does not prevent the trial court judge as

[32]The only difference is that the Alabama statute's fourth aggravating circumstance omits the crimes of arson, aircraft piracy, and bombing from the list of felonies it contains.

sentencing authority from considering the character and record of the individual defendant and the circumstances of the particular capital offense, preclusion is not contrary to *Lockett, Woodson*, or the *Roberts* decisions.[33]

B. Preclusion Does Not Undermine the Reliability of Sentencing Under Alabama's Statute

Attempting to convert what is essentially a due process issue into an Eighth Amendment claim, petitioner argues that the preclusion of lesser included non-capital offenses jeopardizes the reliability of the sentencing decision in a capital case under Alabama's statute. Petitioner's argument is premised upon his assertion that the jury's guilty verdict requires the judge in making the sentence determination to find at least one aggravating circumstance. See pp. 16, 18, and 53 of petitioner's brief. That assertion is wrong.

It is true that the definitions of capital offenses contained in section 13-11-2(a) substantially overlap with the enumeration of aggravating circumstances set out in section 13-11-6. It is also true that the same evidence which convinces the jury beyond a reasonable doubt of the defendant's guilt of the capital offense will usually also

[33]Even if the Alabama statute be perceived as a mandatory one from the jury's perspective, see p. 22, n. 11, *supra*, it has not simply "papered over the problems of unguided and unchecked jury discretion" as had the statutes in *Woodson v. North Carolina*, 428 U.S. at 302-303 (plurality opinion), and *Roberts (Stanislaus) v. Louisiana*, 428 U.S. at 334-335 (plurality opinion). The concern was that those statutes would lead to arbitrary and capricious sentencing results because it was predicted that some juries would convict guilty capital defendants only of lesser included non-capital offenses or would acquit them outright. *Woodson v. North Carolina*, 428 U.S. at 302-303 (plurality opinion); *id* at 314 (Rehnquist, J., dissenting). Alabama's statute forecloses that first possibility by precluding lesser included offenses. The second possibility, wrongful acquittal to avoid what appears to be a mandatory death penalty, is removed by the fact that the statute limits capital offenses to a narrowly defined group of the most brutal crimes and by the fact that the jury has available the mistrial option. See pp. 22-24, *supra*. In any event, the conviction statistics cited on p. 24 of petitioner's brief evidence that there has been no jury nullification in the operation of Alabama's statute.

convince the trial court judge of the existence of at least one aggravating circumstance which the judge will consider along with other aggravating and mitigating circumstances in making the sentence determination. But the judge is not bound by any fact-finding implicit in the jury's verdict, as a recent case makes clear.

The defendant in *Phillip Wayne Tomlin v. State*, 1 Div. 23 (Ala. Cr. App., Nov. 20, 1979),[34] was prosecuted for a capital offense under a three-count indictment. Two of the counts alleged the capital offense of section 13-11-2(a)(10) [first degree murder of two or more victims] and one count alleged it as a violation of section 13-11-2(a)(7) [first degree murder for pecuniary gain]. Slip op. at 3-6. The trial court denied the defendant's timely motion to exclude the state's evidence relating to the pecuniary gain count, which is the Alabama procedural device for directing a verdict in favor of the defendant on that count. Slip op. at 6. However, after the jury had convicted the defendant, the trial court specifically found in making its sentence determination that the defendant did not commit the capital offense for pecuniary gain, and that the aggravating circumstance enumerated in section 13-11-6(6) accordingly did not apply. Slip op. at 6. On appeal, the defendant attacked the apparent inconsistency of the trial court's actions but the Court of Criminal Appeals affirmed, noting that "[t]his seemingly anomalous result is peculiar to the death penalty statute . . ." Slip op. at 8.

The Court of Criminal Appeals explained that a basic legislative concern was to keep the sentence hearing separate and apart from the trial itself, and to stop jury input at the guilt stage. Slip op. at 8. The trial court at the sentence hearing is "allowed substantive and procedural flexibility which is generally prohibited during the jury trial," slip op. at 8-9, and it is not bound to follow any fact-finding of the jury. As the Court of Criminal Appeals

[34]The *Tomlin* opinion has not yet been published. Copies of it in manuscript form have been furnished to the Clerk for the Court's convenience and to opposing counsel.

concluded:

> "Thus, it is a natural consequence that the trial court having at hand not only the benefit of facts garnered at the trial, but also the 'relevant' and 'probative' matters gleaned at the sentence hearing, may make findings of fact seemingly at odds with the prior jury determination. Nonetheless, unless a clear abuse of discretion is shown, the trial court's findings of fact will be upheld." Slip op. at 9.

The jury's verdict of guilt thus does not require that the trial court find the existence of any aggravating circumstance, because the trial court is not bound by any fact-finding implicit in the jury's verdict. The separation of the trial court's fact-finding from the jury's fact-finding operates as a safeguard to ensure that only those who are guilty of a capital offense will receive the death penalty. See pp. 25-27, *supra*.

Another safeguard which ensures the fairness and reliability of capital sentencing decisions under Alabama's statute is appellate review of sentencing. Section 13-11-5 provides that a sentence of death as well as the conviction on which it is based is subject to appellate review, and Alabama's courts have repeatedly interpreted the statute as providing for appellate review of a trial court's decision to impose the death penalty. *E.g., Beck v. State*, 365 So.2d 985, 1000, 1005 (Ala. Cr. App.), *aff'd*, 365 So.2d 1006 (Ala. 1978) (A. 40-41); *Clements v. State*, 370 So.2d 708, 712-713 (Ala. Cr. App. 1978), *rev'd on other grounds*, 370 So.2d 723 (Ala. 1979); *Jacobs v. State*, 361 So.2d 607, 632-633 (Ala. Cr. App. 1977), *aff'd*, 361 So.2d 640, 644 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979); *Neal v. State*, 372 So.2d 1331, 1347 (Ala. Cr. App.) (concurring opinion of Bowen, J.), *cert. denied*, 372 So.2d 1348 (Ala. 1979); *see, Thomas v. State*, 373 So.2d 1149, 1160 (Ala. Cr. App.), *aff'd*, 373 So.2d 1167 (1979); *Evans v. State*, 361 So.2d 654, 662 (Ala. Cr. App. 1977), *aff'd*, 361 So.2d 666, 667 (Ala. 1978), *cert. denied*, 440 U.S. 930 (1979).

As the Court of Criminal Appeals explained in reviewing petitioner's case, "the evidence of aggravating and mitigating circumstances is reviewed and re-weighed not only by the Court of Criminal Appeals of Alabama, but by the Supreme Court of Alabama." *Beck v. State*, 365 So.2d at 1000 (A. 40). This appellate review ensures that capital sentencing decisions will be factually sound. It also ensures consistency and prevents arbitrariness and capriciousness in sentencing. *Gregg v. Georgia*, 428 U.S. at 198, 204-207 (joint opinion); *id.*, at 211-212, 222-224 (concurring opinion of White, J., joined by Burger, C.J., and Rehnquist, J.); *Proffitt v. Florida*, 428 U.S. at 251, 259 (joint opinion).

C. Preclusion Does Not Cause Disproportionate Sentences

Petitioner's argument that preclusion will cause excessive sentences in capital cases is based upon his general assumption that preclusion undermines the proof beyond a reasonable doubt standard, jeopardizes the reliability of fact-finding at the guilt stage, and causes juries to convict defendants of capital offenses when they are actually only guilty of non-capital lesser included offenses. That speculative assumption is unfounded and should be rejected for the reasons discussed on pp. 17-33, *supra*.

Petitioner's argument that preclusion will cause disproportionate sentences in capital cases also ignores the separation of the sentencing determination from the guilt determination, see pp. 25-27, *supra*. In making its sentence decision, the trial court is required to consider objective factors designed to ensure that the sentence is not disproportionate to the crime. For example, it considers such factors as whether the defendant was mentally or emotionally disturbed, section 13-11-7(2), whether the defendant's mental capacity was impaired even if he was not insane, section 13-11-7(6), and whether he was an

accomplice whose participation in the capital felony was relatively minor compared to that of others, section 13-11-7(4).[35] The latter section was cited with approval in *Lockett v. Ohio*, 438 U.S. at 616-617 n. 3 (Blackmun, J., concurring). See also, p. 26, *supra*.

Petitioner's argument also ignores the fact that Alabama provides appellate review of sentencing decisions. See pp. 59-60, *supra*. For example, in the present case, the Court of Criminal Appeals said:

> "We have also considered the mitigating and aggravating circumstances and have found that under the facts of this case, death was the appropriate penalty.
>
> "The facts in this case, after a careful evaluation, show a marked similarity with those in *Jacobs v. State*, supra.
>
> "It seems to us that the result is inescapable that the punishment, too, should be the same." *Beck v. State*, 365 So.2d at 1005 (A. 50).

Comparative appellate review of capital sentences ensures

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[35]Contrary to the implication on p 13 of petitioner's brief, there is no indication that the trial court judge failed to consider in determining sentence whether petitioner was an accomplice whose participation in the capital felony was relatively minor compared to that of his partner in crime, Roy Frank Clements. The fact that the judge did not list that mitigating factor in his sentence findings (A. 34, R. 812-813), simply indicates that he concluded petitioner was not an accomplice whose participation was relatively minor, and that conclusion is well supported by the facts. Petitioner, who is twelve years older than Clements (R. 608-609), drove the vehicle which transported them to and from the murder (A. 23), and it was petitioner who disposed of the victims' wallet and purse afterwards (A. 23, R. 483-484, R. 601-602). Petitioner was the one who was sharpening his knife before the crime (R. 385-388), the one who admitted jumping onto the victim and holding him down while his throat was cut (A. 23, 57, 59-60), and the one who said "We did it" afterwards (R. 481-482, 496-497, 584). It was petitioner whose clothes were so bloodstained after his grisly participation (R. 395, 397, 458, 466, 468, 507, 598-599) that he had to burn them (A. 23, R. 392-394, 483).

consistency and fairness in sentencing. *Gregg v. Georgia*, 428 U.S. at 198, 204-207 (joint opinion); *Proffit v. Florida*, 428 U.S. at 251, 259 (joint opinion), and the independent weighing of aggravating and mitigating circumstances at the appellate level ensures that sentences will not be disproportionate to the crime. On appeal to the Alabama Supreme Court, petitioner did not contest the Court of Criminal Appeals' holding that death was the proper penalty under the facts in this case, and he should not be heard to do so here.

Petitioner's contention that the Alabama statute permits the death penalty to be imposed based on fortuitous events that do not distinguish the moral culpability of defendants has no basis in the facts of this case in particular, see p. 61, n. 35 *supra*, and in general is rebutted by the individualized sentencing and appellate review procedures. See, pp. 25-26, and 57-60, *supra*.

Petitioner also argues on pp. 58-60 of his brief that he was convicted without a "clear cut" finding that he intended to kill the victim. Insofar as that is a complaint about the Alabama statute, it is unjustified because the Alabama Supreme Court has interpreted the statute to require that the defendant either have a particularized intent to kill or be an accomplice to the intentional killing itself. *Ritter v. State*, 375 So.2d at 270, 274-275 (Ala. 1979). Because the felony murder doctrine cannot be used to supply that intent, *Ritter v. State*, 375 So.2d at 273-274, it is not enough that a defendant was involved in the underlying felony which led to the killing. The requirement that the defendant be an accomplice to the intentional killing itself is best explained in light of the facts in *Ritter* where the requirement was held to be met.

The appellant in *Ritter* was a principal to the robbery, but the victim was killed by his co-defendant. 375 So.2d at 274-275. Although Ritter was not the triggerman, the possibility that someone might have to be killed was discussed beforehand and planned for. *Id.* at 275. He and his co-defendant had an agreement that they would kill any

one who attempted to go for a gun, and the only reason that Ritter did not himself kill the victim was that his co-defendant was in his line of fire. *Id.* The Alabama Supreme Court held that those facts justified the conclusion that Ritter was an accomplice to the intentional killing itself. *Id.*

A finding that a defendant either had a particularized intent to kill or was an accomplice to the intentional killing itself means that he can be convicted of a capital offense under the statute, but that does not necessarily end the matter in Alabama. The Alabama Supreme Court indicated in *Ritter* that in any case in which an appellant argued that the death penalty was disproportionate as applied to him because he did not fire the shot or strike the blow that killed the victim, that court would itself review the particular facts involved to determine whether the death penalty was disproportionate as a constitutional matter.[36] 375 So.2d at 275. *See also, Code of Alabama* 1975, §13-11-7(4); *Lockett v. Ohio*, 438 U.S. at 613-617 (Blackmun, J., concurring); *id.* at 635-636 (Rehnquist, J., dissenting).

To the extent that petitioner's intent-to-kill argument refers to the petitioner's own case, then it is an issue not presented for review. The complaint which petitioner makes on p. 58 n. 49 of his brief, arguing that "the trial judge gave the jury an aider-and-abetter and conspiracy instruction which did not focus clearly on the necessity for the jury to find that petitioner had the requisite intent to kill," was not made to the Alabama appellate courts. Petitioner did not raise before the Alabama Court of Criminal Appeals or the Alabama Supreme Court any intent to kill or disproportionality issues. For that reason, this Court need not, should not, and jurisdictionally cannot decide them. See, the cases cited on pp. 43-44, *supra*. In addition, no intent to kill or disproportionality issue is included in the certiorari order in this case (A. 63).

[36]Petitioner did not make that argument to the Alabama Supreme Court (A. 53) or the Court of Criminal Appeals.

D. Neither Preclusion Nor Any Other Factor Has Resulted in an Improperly High Percentage of Death Sentences For Convictions Under Alabama's Statute

The sentencing statistics referred to on pp. 24 and 56-57 of petitioner's brief do not establish that preclusion or any other factor has resulted in an improperly high death sentence rate under Alabama's statute because they do not establish that the rate is too high. The 82% death sentence rate which petitioner cites excludes convictions based on guilty pleas. If capital convictions based on guilty pleas are included, the rate is 67%.[37] Since prosecutors are more likely to plea bargain when the circumstances of the offense and offender are more deserving of a sentence less than death, excluding guilty pleas presents an incomplete picture.

In addition, the 82% death sentence rate includes three cases in which death sentences have since been changed to life imprisonment without parole following new sentence hearings which occurred after that data was compiled.[38] If

[37]Petitioner's statistics are drawn from Respondent's Brief in Opposition to a Petition for a Writ of Certiorari, Jacobs v. Alabama (U.S. October Term, 1978, No. 78-5696) at 10, 35, which shows that as of that time 37 convicted capital defendants had been sentenced to death and 8 had been sentenced to life imprisonment without parole after having been convicted of a capital offense following a plea of not guilty. Pages 2, 9, 10, 12, and 14 of the appendix of that brief also show that as of that time an additional 10 defendants had been sentenced to life imprisonment without parole after having been convicted of a capital offense following a guilty plea. Therefore, 45 + 10 = 55, and 37 ÷ 55 = 67%.

[38]The three cases are: 1) State v. Woodrow Wilson Keller, Jacobs Brief, *supra*, appendix at 12, which was reversed and remanded for a new sentence hearing in *Woodrow Wilson Keller v. State*, 4 Div. 629 (Ala. Cr. App. Feb. 20, 1979), and in which the new sentence of life without parole was noted in *id.* (Ala. Cr. App. Oct. 16, 1979) (after remand); 2) State v. Recardo Cook, Jacobs Brief, *supra*, appendix at 3, which was reversed and remanded for a new sentence hearing in *Cook v. State*, 369 So.2d 1251 (Ala. 1979), and in which a sentence of life without parole was entered on July 2, 1979 (Jefferson County Circuit Court Case No. CC 76-01153); 3) State v. Tommy Lewis, Jacobs Brief, *supra*, appendix at 6, which was reversed and remanded for a new sentence hearing in *Tommy Lewis v. State*, 4 Div. 611 (Ala. Cr. App. Sep. 4, 1979), and in which a sentence of life without parole was entered on November 13, 1979 (Coffee County Circuit Court Case No. CC 77-25).

those three are treated as life without parole cases as they should be since that was the sentence ultimately imposed, then the death sentence rate is 76% if guilty pleas are excluded,[39] or 62% if guilty pleas are included.[40] Therefore, depending upon the data referred to, somewhere between 18% and 38% of an initial group of those convicted of capital offenses under Alabama's statute have received sentences of life imprisonment without parole.

Regardless of whether the death sentence rate is considered to be 62% or 82%, or somewhere in between, the statistics do not establish that preclusion or any other factor has resulted in too high a rate of death sentence imposition under Alabama's statute. Petitioner has offered no evidence whatsoever that any defendant has been sentenced to death under Alabama's statute for any reason other than the fact that death was determined to be the proper sentence by a trial court judge applying objective standards as the sentencing authority.

On pp. 56-57 of his brief, petitioner refers to "historic norms" and cites *Woodson v. North Carolina*, 428 U.S. at 295, n. 31, for the proposition that in the pre-*Furman* era juries exercising unbridled discretion generally sentenced less than 20% of convicted capital murder defendants to death. That figure is inapposite to the present case for two reasons. First of all, the sources referred to in the footnote cited from *Woodson* make it clear that the rate referred to is the rate of death sentences for all those convicted of any kind of murder which was defined as capital in the pre-*Furman* era. Alabama's new capital punishment statute limits the definition of capital offenses to a group of narrowly defined types of aggravated murder, section 13-11-2(a), the very crimes which are most deserving of the death penalty. For example, in the pre-*Furman* era, Alabama law provided death as a discretionary punishment for all first degree murders, including

[39]37 - 3 = 34, and 34 ÷ 45 = 76%.

[40]See n. 37, *supra*. 37 - 3 = 34, and 45 + 10 = 55, 34 ÷ 55 = 62%.

domestic homicides and homicides which were first degree murder by virtue of the felony murder doctrine. Title 14, §§314 and 318, *Code of Alabama* 1940 (Recompiled 1958). Under the post-*Furman* Alabama statute involved in this case neither domestic homicides nor homicides which are first degree murder by virtue of the felony murder rule are defined as capital. *Code of Alabama* 1975, §13-11-2(a) and (b). Mr. Justice White has observed that:

> "As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate . . . it becomes reasonable to expect that [the sentencing authority] — even given discretion not to impose the death penalty — will impose the death penalty in a substantial portion of the cases so defined. If [the sentencing authority] do[es], it can no longer be said that the penalty is being imposed so wantonly and freakishly or so infrequently that it loses its usefulness as a sentencing device. . . ." *Gregg v. Georgia*, 428 U.S. at 222 (concurring opinion of White, J., joined by Burger, C.J., and Rehnquist, J.).

Not only does Alabama's new statute define capital offenses more narrowly than the pre-*Furman* Alabama statute, it also defines them more narrowly than the post-*Furman* statutes of several other states.[41]

The second reason why the "historic norm" provided by pre-*Furman* sentencing is not an appropriate standard by which to judge Alabama's statute is because that sentencing "norm" was the very thing which resulted in the

[41]For example, the statutes upheld in *Profitt v. Florida*, 428 U.S. at 247, n. 4, and *Gregg v. Georgia*, 428 U.S. at 162, n. 4, define all first degree murders, including domestic homicides and homicides which constitute first degree murder solely because of the felony murder doctrine, as capital offenses. The more limited scope of Alabama's capital punishment statute is illustrated by the fact that the crimes involved in *Dobbert v. Florida*, 432 U.S. 282 (1977), and *Gardner v. Florida*, 430 U.S. 349 (1977), could not have been prosecuted as capital offenses in Alabama. See section 13-11-2(a).

Furman decision. The pre-*Furman* "norm" which petitioner would have Alabama strive for was judged to be "pregnant with discrimination," *Furman v. Georgia*, 408 U.S. at 257 (Douglas, J., concurring), caused capital punishment to be "wantonly" and "freakishly" imposed, *id.* at 310 (Stewart, J., concurring), and resulted in the death penalty being imposed with such "great infrequency" that there was "no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not," *id.* at 313 (White, J., concurring). *Accord*, *id.* at 293, 305 (Brennan, J., concurring); *Gregg v. Georgia*, 428 U.S. at 188 (joint opinion). Alabama makes no apologies for not measuring up to that "norm."

E. The Fact That Other States Do Not Preclude Lesser Included Non-Capital Offenses Does Not Mean That Preclusion Violates The Cruel and Unusual Punishments Clause

In holding that the Cruel and Unusual Punishments Clause of the Eighth Amendment was violated by imposition of the death penalty for rape of an adult woman, the plurality in *Coker v. Georgia*, 433 U.S. 584, 595-596 (1977), noted that Georgia was the only state authorizing capital punishment for that crime. It does not follow from *Coker* that the clause is violated whenever a state uses a procedure in capital punishment cases which is different from all other states. *Coker* involved the quantum of punishment, not procedure. The issue of whether a punishment is excessive in relation to a particular crime was held to be within the scope of the Cruel and Unusual Punishments Clause, *Coker v. Georgia*, 433 U.S. at 592 (plurality opinion), but the death penalty is not an excessive punishment for petitioner's crime of first degree murder during the course of a robbery. *Id.* at 598 ("Rape . . . does not compare with murder, which does involve the unjustified taking of human life.")

Woodson v. North Carolina, 428 U.S. 280 (1976), does not

stand for the proposition that the Eighth Amendment mandates uniformity of procedure in capital cases. It was not so much a procedure that was held unconstitutional in *Woodson* as it was an underlying judgment that death could be the proper sentence for all defendants convicted of specified capital offenses regardless of individualized circumstances concerning the offense and offender. *See Woodson v. North Carolina*, 428 U.S. at 292-298, 301, 303-304 (plurality opinion); *Lockett v. Ohio*, 438 U.S. at 601 (plurality opinion). The preclusion of lesser included offenses does not embody such a judgment, and the Alabama statute provides for individualized sentencing and consideration of all the relevant circumstances concerning the offense and offender. See pp. 25-26, *supra*.[42]

The plurality opinions in *Woodson* and *Coker*, did consider "contemporary community values" and "evolving standards of decency," but consideration of such factors does not compel the conclusion that preclusion, like mandatory death penalty provisions or capital punishment for rape, is contrary to the Cruel and Unusual Punishments Clause. In both *Woodson v. North Carolina*, 428 U.S. at 295, and *Coker v. Georgia*, 433 U.S. at 596, the plurality relied upon the jury as "a significant and reliable objective index of contemporary values," *id.* at 596, *quoting Gregg v. Georgia*, 428 U.S. at 181; *accord, Furman v. Georgia*, 408 U.S. at 440-441 (Powell, J., dissenting) (noting that any attempt to discern the prevailing standards of decency must consider the response of juries); *Witherspoon v. Illinois*, 391 U.S. 510, 519-520 & n. 15 (1968) (juries "express the conscience of the community" and their actions reflect "contemporary community values"). The only contemporary data concerning whether juries reject preclusion is what petitioner refers to on p. 24 of his brief as the "astonishing" 96% conviction rate under Alabama's

[42]Unlike mandatory death penalty statutes, the preclusion of lesser included non-capital offenses has not simply "papered over" the problems of unguided and unchecked jury discretion. See p. 57 n. 33, *supra*.

statute. That statistic certainly does not indicate that juries expressing the conscience of the community and reflecting prevailing standards of decency have rejected preclusion.

Nor do history and traditional usage compel the conclusion that preclusion of lesser included non-capital offenses violates the Cruel and Unusual Punishments Clause. History shows that lesser included offenses were designed and developed to assist the prosecution when the evidence at trial failed to establish some element of the offense charged, *e.g., Keeble v. United States*, 412 U.S. 205, 208 (1973); *Kelly v. United States*, 370 F.2d 227 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 913 (1967); *United States v. Markis*, 352 F.2d 860, 866 (2nd Cir. 1965), and traditional usage reflects no more than that fact. Even if traditional usage did reflect a general judgment that the availability of lesser included offenses was necessary as a procedural safeguard in other contexts and circumstances, the special situation under Alabama's capital punishment statute is different. See pp. 21-31, *supra*.

In judging the constitutionality of procedural devices in capital cases, this Court should not adopt an Eighth Amendment approach which focuses upon the singularity or lack of singularity of the procedure. To do so would divert attention from what should be the principal inquiry, would conscript the Cruel and Unusual Punishments Clause to a use for which it was not intended, would call into question the validity of statutes recently upheld by this Court, and would destroy the doctrine of federalism in this area of the law. The principal inquiry in judging the constitutionality of the preclusion of lesser included non-capital offenses should be whether or not it undermines the reasonable doubt standard and jeopardizes the reliability of fact-finding. That issue is fully addressed in petitioner's brief and in this one. See pp. 17-33, *supra*. If preclusion does undermine the reasonable doubt standard and jeopardize the reliability of fact-finding under Alabama's statute, that is a due process concern, and the Due Process

Clause is an adequate tool with which to handle it. If preclusion does not undermine the reasonable doubt standard and jeopardize the reliability of the fact-finding process, then there is no reason for holding preclusion to be offensive to the Eighth Amendment.

The Cruel and Unusual Punishments Clause was never intended to force procedural uniformity on the states in capital cases or any other kind of cases. *See, Furman v. Georgia*, 408 U.S. at 317-321, 322 (Marshall, J., concurring) ("Thus, the history of the clause establishes that it was intended to prohibit cruel punishments."); *id.* at 242-245 (Douglas, J., concurring); *id* at 376-379 (Burger, J., dissenting). Those who would use it for that purpose would have this Court enact what would amount to a uniform code of procedure for capital cases. Under such a regime, states could safely change their procedure, if at all, only by acting in unison.

If this Court holds that procedural singularity is per se bad, that holding would raise serious questions about the validity of a large number of capital punishment statutes, including some which this Court has recently upheld. For example, Texas uses an unusual three-question procedure to determine sentencing in capital cases, *Jurek v. Texas*, 428 U.S. 262, 269 (1976). Would the singularity of that procedure compel a re-examination of the holding in *Jurek?* Georgia provides that if the jury is unable to agree on punishment, a sentence less than death must be imposed. *Gregg v. Georgia*, 428 U.S. at 208 n. 2. If it is determined that most other states provide for a declaration of mistrial and the empaneling of a new sentencing jury, would that mean Georgia's different rule is constitutionally offensive? Florida provides that the jury's advisory verdict on sentencing is determined by majority vote, *Proffitt v. Florida*, 428 U.S. at 248-249. Is the Florida statute doomed if other states have different requirements? *See generally, Jurek v. Texas*, 428 U.S. at 269, n. 5.

This Court held in *Addington v. Texas*, 99 S. Ct. 1804,

1812 (1979), that federalism requires that states not be forced into a common procedural mold. *Addington* was a case which applied the Due Process Clause, but the same holding has been reached in an Eighth Amendment case. *Gregg v. Georgia*, 428 U.S. at 195 (plurality opinion), declared that procedural uniformity was not required in capital punishment cases and that "each distinct system must be examined on an individual basis." If federalism is to have any meaning, this Court should not depart from that rule and should not hold that procedural singularity is constitutionally offensive. Instead, this Court should examine Alabama's statute, including its preclusion of lesser included non-capital offenses, on an individual basis.

VII.

THE RESULT OF FURMAN AND ITS PROGENY DEMONSTRATE THAT THIS COURT SHOULD GIVE FULL WEIGHT TO PRINCIPLES OF JUDICIAL RESTRAINT IN THIS CASE

The issue before this Court is not whether the preclusion of lesser included non-capital offenses by a capital punishment statute is the best or wisest procedure for a state to follow. Instead, the issue is whether such preclusion violates the Constitution. That distinction is mandated by principles of judicial restraint. It is sometimes difficult to apply the doctrine of judicial restraint in capital cases, but the confusion and uncertainty which have existed in the post-*Furman* era demonstrate the wisdom of it.

Members of the Court have on many occasions lectured themselves and their colleagues on the need for judicial restraint in exercising the vast powers of the Court. As Mr. Justice Powell has stated:

> "Throughout our history, Justices of this Court have emphasized the gravity of decisions invalidating legislative judgments, admonishing the nine men who

> sit on this bench of the duty of self-restraint, especially when called upon to apply the expansive due process and cruel and unusual punishment rubrics." *Furman v. Georgia*, 408 U.S. at 418 (dissenting opinion).

The importance of judicial restraint has been stressed time and time again. Mr. Justice Holmes said that reviewing the constitutionality of legislation is, "the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 147-148 (1927) (concurring opinion). Mr. Justice Frankfurter thought judicial restraint so important that he said it was "of the essence in the observance of the judicial oath." *Trop v. Dulles*, 356 U.S. 86, 119-120 (1958) (dissenting opinion). And Mr. Chief Justice Burger has stated that, "[t]he highest judicial duty is to recognize the limits on judicial power and to permit the democratic processes to deal with matters outside those limits." *Furman v. Georgia*, 408 U.S. at 405 (dissenting opinion).

In matters of challenged procedure, judicial restraint mandates that the Court be mindful that the United States Constitution "does not guarantee trial procedures that . . . measure up to the predilections of members of this Court." *McGautha v. California*, 402 U.S. 183, 221 (1971); *accord, Gregg v. Georgia*, 428 U.S. at 175 (plurality opinion) ("we may not act as judges as we might as legislators."). Mr. Justice Blackmun has described both the necessity and the difficulty of applying principles of judicial restraint in capital cases:

> "Our task here, as must so frequently be emphasized and re-emphasized, is to pass upon the constitutionality of legislation that has been enacted and that is challenged. This is the sole task for judges. We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great. In fact, as today's decision reveals, they are almost irresistible." *Furman v. Georgia*, 408 U.S. at 411 (dissenting opinion).

Therein lies the difficulty. Mr. Justice Jackson once recognized that in death penalty cases the Court is tempted to strain the evidence and even the law to spare a defendant's life. *Stein v. New York*, 346 U.S. 156, 196 (1953) (majority opinion). To recognize that tendency is not to legitimatize it. The experience with *Furman* and its progeny demonstrate that judicial restraint is especially needed in capital cases.

Furman came suddenly and "changed abruptly," and in a way never intimated before, the constitutional law applicable to capital punishment. *Lockett v. Ohio*, 438 U.S. at 598 (plurality opinion). What had been specifically approved under the Due Process Clause in *McGautha* was struck down under the Eighth and Fourteenth Amendments only a year later in *Furman*. *Lockett v. Ohio*, 438 U.S. at 599 (plurality opinion). If, as Mr. Chief Justice Burger suggested, such a "pattern of decision-making will do little to inspire confidence in the stability of the law," *Furman v. Georgia*, 408 U.S. at 400 (dissenting opinion), then post-*Furman* developments have done even less.

Part of the uncertainty in the post-*Furman* era stems from the nature of that decision and the opinions supporting it. As the *Lockett* plurality noted, "Predictably, the variety of the opinions supporting the judgment in *Furman* engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment." *Lockett v. Ohio*, 438 U.S. at 599 (footnotes omitted); *accord, Furman v. Georgia*, 408 U.S. at 461 (Powell, J., dissenting) (referring to "the cloudily outlined views" of three Justices whose views were essential to that opinion); *Woodson v. North Carolina*, 428 U.S. at 317 (Rehnquist, J., dissenting) (remarking that for state legislatures to respond to the concerns of *Furman* was "not an easy task considering the glossolalial manner in which those concerns were expressed"). But the *Furman*

decision has not been the only source of difficulty. The *Lockett* plurality acknowledged that, "[t]he signals of this Court have not, however, always been easy to decipher." *Lockett v. Ohio*, 438 U.S. at 602. Mr. Justice Rehnquist expressed it another way when he said:

> "as I believe both the opinion of the Chief Justice and the opinion of my Brother White seem to concede, the Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed." *Lockett v. Ohio*, 438 U.S. at 629 (dissenting opinion).

Accord, id. at 622-623 (White, J., concurring) ("The Court has now completed its about-face since *Furman*"). State legislatures and courts have tried mightily to comply with the dictates of this Court's capital punishment decisions, but it is difficult to hit a moving target.[43]

Stare decisis and the predictability and stability of the law have not been the only values sacrificed by the decisions striking down capital punishment statutes. The supreme irony is that *Furman* and its progeny have, in actual operation, sacrificed those very values that they held so constitutionally important. There has been no greater source of arbitrariness and capriciousness in the post-*Furman* era than the uncertainty and unpredictability of the law. At least 39 states and the District of Columbia had their capital statutes invalidated by *Furman*. *Furman v. Georgia*, 408 U.S. at 385 (Burger, C.J., dissenting); *id.* at 417 (Powell, J., dissenting). When that happened, some 600 persons, *see*, 408 U.S. at 417 (Powell, J., dissenting), escaped capital punishment

[43]No better example of that difficulty can be found than in *Lockett*, where the plurality noted that what it was holding to be constitutionally required in that decision "reasonably would have appeared to be [of] questionable constitutionality" under *Furman*. *Lockett v. Ohio*, 438 U.S. at 599-600 n. 7. Indeed, Ohio was in the process of enacting exactly what *Lockett* would later require when *Furman* was released and caused the Ohio Legislature to change its mind. *Id.*

simply because the states had understandably not predicted *Furman*. Within four years after *Furman*, 35 states had re-enacted capital punishment statutes, *Gregg v. Georgia*, 428 U.S. at 179 (plurality opinion), but no fewer than 10 of them were invalidated by the *Woodson* and *Roberts* decisions because the legislatures in those states adopted mandatory statutes, *see, Woodson v. North Carolina*, 428 U.S. at 313 (Rehnquist, J., dissenting), something they thought *Furman* required. *Id.* at 298-299 (plurality opinion); *see generally, Furman v. Georgia*, 408 U.S. at 413 (Blackmun, J., dissenting). Hundreds of persons convicted of capital offenses escaped the death penalty because of that development. Another post-*Furman* statute was struck down in *Lockett*, again because a state legislature understandably failed to anticipate what would be held to be constitutionally required, see p. 74 n. 43, *supra*, and accordingly its death row was emptied.

The net result is that only one person has been executed against his will in the seven and a half years since *Furman*, and literally hundreds have escaped execution because of the uncertainty and confusion about what the Constitution requires. This resulting situation seems even more arbitrary and capricious than the one that *Furman* was intended to remedy. *See, Woodson v. North Carolina*, 428 U.S. at 309 (Rehnquist, J., dissenting) ("a result surely as 'freakish' as that condemned in the separate opinions in Furman"); *see generally, Furman v. Georgia*, 408 U.S. at 291 & n. 40 (concurring opinion of Brennan, J.); *id.* at 434 n. 18 (dissenting opinion of Powell, J.). It also contradicts the principle that capital punishment should not be imposed with such "great infrequency" that there is "no meaningful basis for distinguishing the many cases in which it is imposed from the few cases in which it is not." *Furman v. Georgia*, 408 U.S. at 313 (White, J., concurring); *Gregg v. Georgia*, 428 U.S. at 188 (joint opinion); *see Furman v. Georgia*, 408 U.S. at 293 (Brennan, J., concurring) ("Indeed, it smacks of little more than a lottery system.").

The purpose of this discussion is not to suggest that this Court does not have the responsibility for determining the constitutionality of the preclusion of lesser included non-capital offenses under Alabama's statute. Certainly it does. Nor is it to suggest that the statute's preclusion clause should not be struck down if this Court determines that that clause violates the Constitution. Certainly it should be. Instead, the purpose of the discussion is to suggest respectfully that in deciding the constitutional issues which are raised by preclusion, this Court should give full weight to the principles of judicial restraint, and should consider the de facto arbitrariness and capriciousness which results whenever a capital punishment statute is struck down. The purpose of the discussion is also to suggest respectfully that while striking down a capital punishment statute is always "the easy choice," *Furman v. Georgia*, 408 U.S. at 410 (Blackmun, J., dissenting), it is not always the proper one.

VIII.

THE PRECLUSION ISSUE SET OUT IN THE CERTIORARI ORDER IS PRESENTED IN THIS CASE, BUT CERTAIN OTHER ISSUES ARE NOT

The question to be considered in this case is limited in two important ways by the order granting certiorari (A. 63). First, whether petitioner's conviction itself is to be reversed if preclusion is held to be constitutionally impermissible should not be considered, because the order limits the question to whether the sentence of death may be imposed under the posited circumstances. Relying upon that limitation, Alabama has not addressed in this brief the issue of whether, assuming that the death penalty cannot be imposed, Alabama could constitutionally re-sentence petitioner to a punishment less than death without

retrying him.[44]

The second limitation is that the certiorari order posits that there was some evidentiary theory upon which a lesser included offense verdict could have been based. The possibility of a different rule for cases in which there is no evidentiary basis whatsoever for a lesser included non-capital offense verdict should not be foreclosed in this case. That limitation of the inquiry is in keeping with the well-established rule that juries should not be instructed on a lesser included offense if there is no basis in the evidence to support a conviction for the lesser included offense instead of for the higher offense. *E.g., Sansome v. United States*, 380 U.S. 343, 350 (1965); *Berra v. United States*, 351 U.S. 131 (1956); *Fulgham v. State*, 291 Ala. 71, 277 So.2d 886, 890 (1973); *Kelly v. State*, 235 Ala. 5, 176 So. 807, 808-809 (1937); *Golston v. State*, 57 Ala. App. 623, 330 So.2d 446, 449-450 (1975). It is also in keeping with this Court's implicit holding in *Gregg v. Georgia*, 428 U.S. 153 (1976), that the Constitution does not require that the jury be permitted to convict a capital defendant of a lesser included non-capital offense if there is no evidence at all to support a conviction on that lesser included offense.[45]

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[44]Petitioner recognizes that the Court's decision need only address the validity of the death sentence by noting on p. 34 of his brief that capital cases differ from non-capital cases, "because of the life-or-death choice at stake, and because of the grave public interest in avoiding an erroneous and irrevocable capital conviction and execution." In *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 336 (1976), and *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 638 (1977), the judgments of the state appellate courts were reversed only insofar as they upheld the death sentences in those cases. Mr. Justice White stated in *Gardner v. Florida*, 430 U.S. 349, 364 (concurring opinion), that "my conclusion is limited, as was *Woodson*, to cases in which the death penalty is imposed."

[45]Such a holding is implicit in *Gregg* because the Georgia statute which was upheld did not require lesser included non-capital offenses to be submitted to the jury unless a conviction for such offenses could be supported by some view of the evidence, *Gregg v. Georgia*, 428 U.S. at 163, and because this Court affirmed the conviction and sentence of death even though the trial judge had refused to instruct the jury in that case on the lesser included non-capital offense of manslaughter for which there was no evidentiary basis. 428 U.S. at 160, 161 n. 2, 215-216.

If this Court holds preclusion to be constitutionally impermissible under the facts of this case, it does not follow that every sentence of death imposed under Alabama's statute must be vacated. One case in which there was no evidence whatsoever to support an instruction on a lesser included non-capital offense is that of Wayne Eugene Ritter, which is reported as *Evans and Ritter v. State*, 361 So.2d 654 (Ala. Cr. App. 1977), *remanded*, 361 So.2d 666 (Ala. 1978), *aff'd after remand*, *Ritter v. State*, 375 So.2d 266 (Ala. Cr. App. 1977), *aff'd* 375 So.2d 270 (Ala. 1979). The *Ritter* case is currently pending before this Court on a petition for a writ of certiorari. Ritter v. Alabama (No. 79-5741).[46] In such cases, the jury would not have been permitted to convict the defendants of a lesser included offense even if Alabama's statute did not preclude lesser included non-capital offenses. *See, e.g., Fulgham v. State*, 291 Ala. 71, 277 So.2d 886, 890 (1973); *Kelly v. State*, 235 Ala. 5, 176 So. 807, 808-809 (1937); *Golston v. State*, 57 Ala. App. 623, 330 So.2d 446, 449-450 (1975); *see also, Sansome v. United States*, 380 U.S. 343, 350 (1965).

In the present case, if it had not been for the preclusion clause in Alabama's statute, lesser included offense instructions would have been given. The capital crime with

[46]The petitioner in *Ritter* repeatedly confessed and admitted all of the elements of the capital offense for which he was convicted. Against the objections of his attorneys, he entered a guilty plea at trial, took the stand and freely admitted he was guilty of the capital offense, and he asked to be executed. *Evans and Ritter v. State*, 361 So.2d at 655-661; *Ritter v. State*, 375 So.2d at 276. It is Alabama's position that even if the Court determines in the present case that a sentence of death cannot be imposed following preclusion of lesser included non-capital offenses if there was evidence to support an instruction on a lesser included non-capital offense, the death sentence in *Ritter* should not be reversed because there was absolutely no evidentiary dispute whatsoever about any element of the capital offense in that case. See Respondent's Brief in Opposition to Petition for Writ of Certiorari, Ritter v. Alabama (U.S. Oct. Term, 1979, No. 79-5741). The same is true of the death sentence imposed in the case of Ritter's co-defendant John Louis Evans, whose case is currently pending before the Fifth Circuit Court of Appeals in *Evans v. Britton*, 472 F. Supp. 707 (S.D. Ala. 1979), *appeal pending* (Fifth Circuit No. 79-2674).

which petitioner was charged is first degree murder during the course of a robbery. See p. 3 n. 2, *supra*. The two basic elements of that crime are robbery and first degree murder. There is an additional requirement concerning the defendant's intent or culpability for the killing. In *Ritter v. State*, 375 So.2d 270, 274-275 (Ala. 1979), the Alabama Supreme Court interpreted the statute as requiring either that the defendant have had the particularized intent to kill or have been an accomplice to the intentional killing itself. It is not enough that the defendant was a principal or accomplice to the underlying felony of robbery, but it is not required that he actually have done the killing himself. Instead, he is guilty of the capital offense if he sanctioned or facilitated the killing.

Because petitioner not only denied that he did the killing himself but also denied that he sanctioned or knowingly facilitated it, there was enough evidence, though just barely, to have supported lesser included non-capital offense instructions for the crimes of first degree murder and robbery had such instructions not been precluded by the statute. This conclusion does not mean that petitioner was not guilty of the capital offense, nor does it mean, as petitioner claims, that there was "strong evidence" that the petitioner was guilty of only a non-capital crime. Instead, that conclusion simply reflects the Alabama rule that when lesser included offenses are not precluded, the jury is to be instructed on them when there is "any evidence, however weak, insufficient, or doubtful in credibility" to support them. *Davis v. State*, 31 Ala. App. 508, 19 So.2d 356, 358 (1944), *aff'd*, 246 Ala. 101, 19 So.2d 358, 360 (Ala. 1944) ("unless there is an entire absence of evidence tending to show" that the defendant could have been guilty of the lesser offense instead of the greater one).[47]

[47]The evidentiary basis for the theory that petitioner was not guilty of the capital offense because he neither killed the victim nor sanctioned or facilitated the killing is certainly weak, insufficient, and doubtful in credibility. Petitioner's participation in the crime is described on p. 61 n. 35, *supra*. In addition, the most telling fact of all is that the victim knew

[footnote continued on next page]

While the evidence would have supported an instruction permitting the jury to convict the defendant of robbery and first degree murder, it would not have support an instruction on second degree murder as petitioner claims, because petitioner's own admissions and trial testimony established all of the elements of the higher offense of first degree murder.[48] Felony murder is one of the four types of first degree murder under *Code of Alabama*, §13-1-70. Petitioner did not deny any of the elements of felony murder at trial nor has he denied them before this Court. Page 22 of petitioner's brief refers to "petitioner's admitted participation in a serious non-capital crime (robbery) which, even petitioner acknowledged, culminated in the deadly knifing of the victim . . .". See also p. 72 of petitioner's brief where he admits that in order to establish felony murder the state need not prove that a defendant intended or contemplated the death of the victim, but merely that the defendant was guilty of a robbery and that a homicide occurred during the robbery.

[footnote continued from preceding page]
the petitioner and could identify him. Petitioner did not deny that fact and admitted as much when he testified that the victim had on an earlier occasion introduced some people to petitioner. (R. 586). Petitioner participated in the robbery knowing that the only way he could get away with it was for the victim to be killed. Contrast the facts in this case with *Lockett v. Ohio*, 438 U.S. 586, 590 (1978) ("Because she knew the owner, Lockett was not to be among those entering the pawnshop . . ."). The trial court properly instructed the jury that it could take into consideration any interest a witness might have, and could consider the petitioner's own self-serving testimony in light of his interest in the verdict. (A. 10).

[48]Since it is conceded that the jury would have been permitted to convict petitioner of the lesser non-capital offenses of robbery and first degree murder had the Alabama statute not precluded lesser included offenses, it is not necessary that this Court determine whether or not the jury would also have been permitted to convict him of second degree murder. The second degree murder question is discussed in this brief because if this Court adopts in dictum or otherwise petitioner's erroneous statements concerning Alabama law on this point, it might cause a great deal of confusion in other cases. The possibility of confusion is particularly likely to occur if this Court adopts petitioner's misconstruction of *Code of Alabama* 1975, §13-1-73 and cases applying it, see pp. 81-82, *infra*.

The argument on p. 75 of petitioner's brief that felony murder requires that a defendant be found to have had some basis for knowing that there was a substantial possibility that someone might be killed misconstrues Alabama law. *Ritter v. State*, 375 So.2d at 273-274, did state that under the felony murder rule culpability stems from participation in an inherently dangerous felony, one in which the defendant should have known there was a substantial possibility someone would be killed, but *Ritter* did not hold that there was a case-by-case determination of whether the defendant knew there was a substantial possibility that someone would be killed. Instead, section 13-1-70 itself makes the determination that all robberies are sufficiently dangerous to meet that criterion, and the Alabama courts have held that every homicide committed during a robbery is within the felony murder rule and all the robbers are guilty of first degree murder. *E.g.*, *Woods v. State*, 333 So.2d 178, 181 (Ala. Cr. App. 1976); *Smith v. State*, 57 Ala. App. 468, 329 So.2d 158, 159 (1976); *King v. State*, 49 Ala. App. 111, 269 So.2d 130, 134 (1972). The passage petitioner refers to from *Ritter v. State*, 375 So.2d at 374, merely explains the rationale behind the statutory and case law rule that a robber is guilty of felony murder for every homicide which occurs during the robbery.

Petitioner asserts on p. 74 of his brief that whenever a jury is instructed on first degree murder Alabama law requires it to be instructed on second degree murder also. That assertion is wrong. The cases petitioner cites merely applied *Code of Alabama* 1975, §13-1-73, or an earlier codification of it. That statutory provision applies only when the jury convicts a defendant "under an indictment for murder." The petitioner was not tried under an indictment for murder but under an indictment which charged that he committed the section 13-11-2(a)(2) capital felony of first degree murder during the course of a robbery. The Alabama Supreme Court has repeatedly held that crime cannot be referred to or treated as murder, or capital murder, or even murder under aggravated

circumstances. *E.g., Clements v. State*, 370 So.2d 723 (Ala. 1979); *Watters v. State*, 369 So.2d 1272 (Ala. 1979); *Jacobs (John L.) v. State*, 371 So.2d 448 (Ala. 1979). Therefore, the special rule of section 13-1-73 does not apply, and petitioner would not have been entitled to an instruction on second degree murder even if the Alabama capital punishment statute had not precluded lesser included offenses.

In closing, it is important to note that although the jury was precluded from convicting petitioner of any lesser included non-capital offenses, it was not precluded from determining that petitioner was guilty of only a lesser included offense or offenses. The jury was properly charged on the elements of both first degree murder and robbery (A. 7-10). Under the statute and under its instructions the jury was due to acquit petitioner of the capital offense if it determined that he was only guilty of a lesser non-capital offense. The jury's verdict evidences that it determined petitioner was guilty of the capital offense, and since the evidence which would have supported a determination that petitioner was only guilty of a lesser non-capital offense was weak, insufficient, and doubtful in credibility, see p. 61, n. 35, *supra*, it is not suprising that the jury needed only ninety minutes of deliberation to reach its verdict (R. 757).

CONCLUSION

The judgment of the Alabama Supreme Court affirming the conviction and sentence of petitioner should be affirmed.

Respectfully submitted,

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78-6621

ADDENDUM TO RESPONDENT'S BRIEF

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1979-80

1 Div. 23

Phillip Wayne Tomlin

v

State

Appeal from Mobile Circuit Court

BOOKOUT, JUDGE

Murder in the first degree wherein two or more human beings are intentionally killed, and murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire; sentence: death by electrocution.

The State's evidence was sufficient to justify appellant's conviction even though there was no eyewitness testimony concerning the double killings. It is therefore unnecessary for the purposes of this appeal to narrate a detailed account of the brutal and calculated murders contained in the voluminous record before us. Briefly, the facts are as follows:

At approximately 5:30 p.m. on January 2, 1977, at the Theodore-Dawes Exit to Interstate 10 in Mobile, nineteen-year-old Ricky Brune and fifteen-year-old Cheryl Moore were found dead in the front seat of Brune's car. Their deaths resulted from multiple gunshot wounds in the back from a sixteen-gauge shotgun and a .38 caliber pistol. The fatal shots were fired from inside the car from the rear seat. An unoccupied 1968 Ford had been spotted parked at the exit with the motor running at 4:50 p.m.

The appellant and his "partner," John Ronald Daniels, had arrived in Mobile at Randy and Danny Shanks' trailer the night before between 11:30 and 12:00 p.m. after travelling from Houston, Texas. The Shanks were the appellant's brothers-in-law. The appellant introduced Daniels as his "hit man" and told the Shanks "he had come to Mobile to get revenge ... on the guy that killed his brother ... [that] he was going to kill the person who killed his brother." The appellant's brother had been killed as a result of an accidental shotgun discharge which involved Ricky Brune on November 25, 1975.

After midnight on January 2, Randy Shanks rented a room at the Eight Days Inn for appellant and Daniels. Inside the motel room the appellant and Daniels showed the Shanks the .38 and .44 caliber pistols and a disassembled sixteen-gauge shotgun. The weapons were kept in a satchel. Later, the appellant drove the Shanks back to their trailer and asked Danny if he could use his car "the next day to get out of town." Danny told him no, that he "didn't want to get involved in it." The appellant was driving his sister's 1968 Ford.

The appellant and his "hit man" Daniels were last seen in Mobile between 3:00 and 4:00 p.m. the afternoon of the murders at the Highway 90 Lounge located two miles north of the Theodore-Dawes Exit. Outside the lounge inside his sister's car, the appellant had conversations with the Shanks brothers and James Stokes. The appellant was next seen in Houston, Texas, late that night. His sister's 1968 Ford was found abandoned at the New Orleans International Airport.

I

The appellant contends that Counts 1 and 3 of the indictment were defective and that his demurrer to those counts should have been granted. We do not agree. Omitting the formal parts, the indictment charges that the appellant, Phillip Wayne Tomlin:

> "... did unlawfully, intentionally, and with malice aforethought kill Richard Brune and Cheryl Moore by, towit: on January 2, 1977, at a location on or near Interstate 10 in Mobile County, Alabama, was shot with a gun, in violation of Act Number 213, Section 2, Sub-Section J (Act #213, §2(j)), Acts of Alabama, Regular Session, 1975, against the peace and dignity of the State of Alabama.
>
> "... did unlawfully, intentionally, and with malice aforethought kill Richard Brune and Cheryl Moore by shooting Richard Brune and Cheryl Moore with a gun, said killings were done for a pecuniary or other valuable consideration, or pursuant to a contract or for hire, in violation of Act Number 213, Section 2, Sub-Section G (Act #213, §2(g)), Acts of Alabama, Regular Session, 1975, against the peace and dignity of the State of Alabama.
>
> "... did unlawfully, intentionally, and with malice aforethought kill Richard Brune and Cheryl Moore, by shooting them with a gun, wherein both Richard Brune and Cheryl Moore were intentionally killed by PHILLIP WAYNE TOMLIN by one or a series of acts, in violation of Act Number 213, Section 2, Sub-Section J (Act #213, §2(j)) and Act Number 213, Section 6, Sub-Section H (Act #213, §6 (h)), Acts of Alabama, Regular Session, 1975, in that said killings were especially heinous, atrocious or cruel...."

Appellant pled not guilty to the charges at his arraignment on October 13, 1977. He reserved the right to file special pleas within twenty days. Appellant did not file his demurrer to the indictment until March 20, 1978, after the jury had been empaneled. We hold that appellant's indictment was not subject to demurrer, and in any event the delay in filing constituted a waiver.

Recently we reaffirmed long standing principles recognized by this court and the Alabama Supreme Court by holding the following:

> "Generally, a demurrer is the proper procedure to raise defects in an indictment. Andrews v. State, 344 So.2d 533 (Ala.Cr.App.), cert. denied, 344 So.2d 538 (Ala. 1977). Since a plea to the merits admits the validity of an indictment, a demurrer filed after arraignment and after a plea of not guilty is properly stricken. Underwood v. State, 248 Ala. 308, 27 So.2d 492 (1946). The right to file a demurrer is waived unless the demurrer is filed before a plea to the merits. Holloway v. State, 37 Ala.App. 96, 64 So.2d 115, cert. denied, 258 Ala. 558, 64 So.2d 121 (1953). If an indictment is merely voidable and subject to demurrer, the failure to demur will prevent appellate review of the indictment's short comings. Williams v. State, 333 So.2d 610 (Ala.Cr.App.), affirmed, 333 So.2d 613 (Ala. 1976)."
>
> Tommy Edwards v. State, ___ So.2d ___ (Ala.Cr.App. 1979).

Of course if an indictment is void as opposed to voidable, as where the indictment does not on its face charge an offense, or where the accused is left unaware of the nature and cause of the charge against him, this court is bound to take notice of such defect even in the absence of an objection. Edwards, supra; Davidson v. State, 351 So.2d 683 (Ala.Cr.App. 1977); Fitzgerald v. State, 53 Ala.App. 663, 303 So.2d 162 (1974). If the indictment had been void rather than voidable, the defect would have been reached by the appellant's request for an affirmative charge. Edwards, supra; Coker v. State, 18 Ala.App. 550, 93 So. 384 (1922). The defect could have been preserved by a motion in arrest of judgment. Francois v. State, 20 Ala. 83 (1852).

In the instant case, however, each count of the indictment stated an offense in such a manner as to apprise appellant of the nature of the charges against him. We hold, therefore, that the indictment was not void on its face and that the trial court was correct in overruling the untimely demurrer.

Even had the demurrer been timely filed, we hold that the faulty grammar in Count 1 was not objectionable.

> "Before an objection because of false grammar, incorrect spelling, or mere clerical errors is entertained, the court should be satisfied of the tendency of the error to mislead, or to leave in doubt the meaning of the charge to a person of common understanding, reading, not for the purpose of finding defects, but to ascertain what is intended to be charged. Grant v. State, 55 Ala. 201 (1876). Neither clerical nor grammatical errors vitiate an indictment unless they change the words or obscure the meaning, Grant, supra, or unless the error changes a word into one of different import or the sense is so obscure that one of ordinary intelligence cannot determine with certainty the meaning from the context. Sanders v. State, 2 Ala.App. 13, 56 So. 69

(1911)...."
Cook v. State, 369 So.2d 1243 (Ala.Cr.App. 1977), affirmed in part, reversed in part on other grounds, 369 So.2d 1251 (Ala. 1978).

The sense of Count 1 in the indictment is clear. The grammatical error did not obscure the sense of what was intended to be charged.

Contrary to appellant's argument that Count 1 of the indictment charges no more than the first degree murder of two persons, we hold that the requisite language of § 13-11-2(a)(10), Code of Ala. 1975, is sufficiently followed to charge a capital offense. The Alabama Supreme Court has specifically held that the capital offense expressed in § 13-11-2(a)(10) is murder aggravated by two or more individuals being killed. Ex parte Clements, 370 So.2d 723, 726 (Ala. 1979). It is thus distinguishable from traditional noncapital first degree murder.

It was proper that each count allege that the killings were done "unlawfully, intentionally, and with malice aforethought," elements of the first degree murder statute, rather than solely done intentionally. Section 13-11-2(a)(10) requires proof of (1) murder in the first degree (2) wherein two or more people are intentionally killed by the defendant. Thus first degree murder and an intentional killing must be alleged and proved under the instant statute.

Count 3 of the indictment was likewise not subject to demurrer for concluding that "said killings were especially heinous, atrocious or cruel" — language found in § 13-11-6(8). That language was mere surplusage to the first part of Count 3 which properly charged a capital offense under § 13-11-2(a)(10). As early cases have held, unnecessary averments in an indictment do not impair its validity. The most that can result from them is to hold the prosecution to the proof of them. Aaron v. State, 39 Ala. 75 (1863). Johnson v. State, 35 Ala. 363 (1860); Lindsay v. State, 19 Ala. 560 (1851). Surplusage does not vitiate an indictment otherwise good. McDaniel v. State, 20 Ala.App. 407, 102 So. 788, cert. denied, 212 Ala. 415, 102 So. 791 (1924). As long as the remaining portions of an indictment validly charge a crime, the existence of surplusage will not affect the validity of a conviction. United States v. Hyde, 448 F.2d 815 (5th Cir.), cert. denied, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745 (1971).

II

Appellant contends that the trial court erred in failing to exclude the State's evidence relating to Count 2 of the indictment. Appellant correctly maintains that the State presented no evidence that the appellant himself committed the killings for pecuniary gain or pursuant to a contract or for hire. It is thus argued that appellant's motion to exclude the State's evidence for failure to prove a prima facie case under Count 2 of the indictment should have been granted.

In addition, the trial court at the sentence hearing specifically found that the killings were not committed for pecuniary gain and also that the appellant was not an accomplice, but was an actual participant in the murders. It is argued that the trial court's determination after the sentence hearing that the killings were not committed for pecuniary gain is in direct conflict with his denial to exclude the State's evidence as to Count 2 of the indictment at the trial. The above two contentions, while logical and persuasive, must fail. We shall address appellant's arguments separately.

A

The evidence clearly demonstrated that John Ronald Daniels, appellant's "partner," was a "hit man." Appellant had come to Mobile to get "revenge" for the death of his brother. The inference is clear that appellant's "partner" Daniels was to commit the killings pursuant to a contract or for hire. This evidence decidely falls within the parameter of a murder done for pecuniary gain or pursuant to a contract or for hire as defined in § 13-11-2(7), Code of Ala. 1975.

It does not matter that the appellant himself did not commit the murders. A jury question was

presented as to whether appellant was Daniels' accomplice. The jury was correctly charged on the law regarding accomplice participation in a crime.

Under the accomplice statute, § 13-9-1, Code of Ala. 1975:

> "The distinction between an accessory before the fact and a principal, between principals in the first and second degrees, in cases of felony, is abolished; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense or aid or abet in its commission, though not present, must hereafter be indicted, tried and punished as principals, as in the case of misdemeanors." (Emphasis added.)

The applicability of the accomplice statute to the death penalty statute has been discussed in Colley v. State, ___ So.2d ___ (Ala.Cr.App. 1979); in a special concurrence in Ritter v. State, ___ So.2d ___ (Ala.Cr.App. 1978); and by the Alabama Supreme Court in Ritter v. State, ___ So.2d ___ (Ala. 1979). A general verdict of "guilty of murder as charged in the indictment" was returned by the jury. Conceivably the jury could have found appellant guilty under Count 2 of the indictment. We find that the accomplice statute is applicable to sustain the verdict in the instant case.

The circumstantial evidence was ample for the jury to have found that the appellant was an active participant in the murders and that he was present at the scene of the murders with a view to render aid to Daniels as it became necessary. Where the evidence presented raises questions of fact for the jury and such evidence, if believed, is sufficient to sustain a conviction, the denial of a motion to exclude the State's evidence does not constitute error. Young v. State, 283 Ala. 676, 220 So.2d 843 (1969). Thus by way of the accomplice statute, Count 2 of the indictment was properly allowed to remain before the jury for their consideration. We do not say that the jury found the appellant guilty under Count 2, only that they properly had the option of so finding.

B

As to the second part of appellant's argument, we hold that the trial court could properly have found at the sentence hearing in considering the aggravating and mitigating circumstances that the killings were not committed for pecuniary gain and that the appellant was not an accomplice to the murders. Sections 13-11-6(6) and 13-11-7(4), Code of Ala. 1975. This is so despite the fact that the trial court had previously given the jury the option of deciding these same questions of fact by properly allowing, as we have determined, Count 2 to remain before the jury for their consideration. This seemingly anomalous result is peculiar to the death penalty statute and is explained as follows.

A basic legislative concern underlying our death penalty statute is that the sentence hearing be kept separate and apart from the trial itself and from any jury input as to the ultimate sentence to be imposed which is either death or life without parole. Section 13-11-3, Code of Ala. 1975. The sentence hearing is conducted by the trial court sitting alone and only upon a prior jury determination at the trial that the accused is guilty of a capital offense. Such a prior determination of guilt by the jury carries an automatic death sentence; the jury input stops at that point. Boiled down to its essence, the sentence hearing is designed in theory to benefit the accused by allowing the trial court to reduce his sentence from death to life without parole when the mitigating circumstances so require. The trial court in effect is allowed to act as a sentence reducer if it finds sufficient mitigating circumstances or lack of aggravating circumstances. Sections 13-11-3 and 13-11-4.

The sentence hearing is further differentiated from the trial by what evidence is allowed to be presented.

> "... In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, pro-

vided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama...." (Emphasis added.)
Section 13-11-3, Code of Ala. 1975.

By definition the trial court is to have latitude and discretion as to what matters may be presented and considered at the hearing. Specifically the trial court is not limited by the exclusionary rules of evidence it is required to adhere to during the actual trial. In short the trial court at the sentence hearing is allowed substantive and procedural flexibility which is generally prohibited during the jury trial.

Thus it is a natural consequence that the trial court having at hand not only the benefit of the facts garnered at the trial, but also the "relevant" and "probative" matters gleaned at the sentence hearing, may make findings of fact which include aggravating and mitigating circumstances which are seemingly at odds wi . the prior jury determination. Nonetheless, unless a clear abuse of discretion is shown, the trial court's findings of fact will be upheld.

In the case at bar there was sufficient evidence for Count 2 of the indictment to have remained before the jury. This was so by way of the accomplice statute. However, as previously stated, Counts 1 and 3 charged murder in the first degree wherein two or more persons were intentionally killed. The charges in Counts 1 and 3 were in no way connected with a killing for pecuniary gain, nor under those counts was there the necessity of finding that the appellant was an accomplice. Thus, if after the trial and sentence hearing the trial court independently determined that the murders were accomplished pursuant to the charges in Counts 1 and 3 and not Count 2, it was entirely within the trial court's discretion to find that the killings were not committed for pecuniary gain and that the appellant was not an accomplice. Further discussion regarding the trial court's findings of fact after the sentence hearing will be necessary later in this opinion, but for the purpose

III

Prior to trial the appellant filed a "Motion to Require District Attorney to Disclose Evidence." Side bar colloquy by the assistant district attorney regarding State evidence which he considered would be a "bomb" or "big surprise" prompted this motion. The trial court granted the motion and ordered the district attorney's office "to submit to the attorneys for the defendant a list of all witnesses which have been subpoenaed and a list of all witnesses who will be subpoenaed."

At trial the State called their "bomb," Eddie Hebison, a narcotics officer for the state of Texas. Officer Hebison's name was not included on the list of witnesses submitted by the State which included thirty-four names. Officer Hebison's testimony was basically that on March 19, 1976, he went to the "Wet and Wild Lounge" in Houston, Texas, working as cover for his partner, David Hammonds, who was to arrange a drug transaction with the appellant. While sitting at a table with his back to Agent Hammonds and appellant, he heard appellant tell Hammonds "that he would not do any larger drug transaction with him at this time because he was going to Alabama to take care of some family business and kill someone there, and that he had learned that his brother's killing had not been an accident, that it was — that he had been murdered with a sawed-off shotgun in a drug rip off deal." Appellant did sell a small quantity of marijuana and methamphetamine to Agent Hammonds at that time. In a Texas trial that resulted in a hung jury, Officer Hebison testified against appellant as to that sale in Texas.

Appellant maintains that reversible error occurred when the State called Officer Hebison whose name was not included on the list of witnesses which the court had ordered to be turned over. Appellant contends that had Hebison's name been included the Texas transcript concerning the drug case could have been obtained. Without the Texas transcript, appellant argues he was not able to effectively impeach Hebison and that his right to cross-examination was impaired. We do not agree.

While this court will not sanction disregard of a court order, we have been cited to no authority which would require the State to submit to an accused a list of all the witnesses it expects to call at the accused's trial. In Thigpen v. State, 49 Ala.App. 233, 270 So.2d 666, 671 (1972), this court stated:

> "... we do not deem the constitutional right to compulsory process in a criminal case to operate in such a manner as to compel pre-trial discovery as to who in fact are witnesses for the State. Rather, the law assumes that defense counsel will act with due diligence so as to have such witnesses as necessary available at trial. Then, by way of compulsory process for obtaining such witnesses, the defendant is secured of a proper presentation of his case at trial...."

In Dolvin v. State, 51 Ala.App. 540, 287 So.2d 250 (1973), fifteen witnesses were listed on the docket sheet at least three days before the trial. This represented two-thirds of the witnesses called by the State. This court in Dolvin, relying in part on the Thigpen decision, held that knowledge of the identity of the fifteen witnesses could have furnished the defense counsel with some indication of the remaining eight witnesses which were called. In Thigpen and Dolvin it was pointed out that the defendant had ample opportunity for a thorough and extensive cross-examination.

In the case at bar the appellant conducted a thorough and sifting cross-examination of Officer Hebison. In addition, Officer Hebison's partner, David Hammonds, was included on the witness list submitted by the State. He, too, had testified in the Texas drug case. Thus access to the Texas transcript, for whatever conceivable defense purpose it might have served, could have been obtained by notice that Hammonds was going to be called as a State witness. Furthermore, Agent Hammonds was called in the instant case and testified to substantially the same facts regarding his conversation with the appellant in the "Wet and Wild Lounge." Thus Hebison's testimony was fully corroborated by an "anticipated" witness. Therefore, the absence of Officer Hebison's name from the State's witness list was harmless at most. ARAP, Rule 45.

IV

After the jury had deliberated approximately four hours, they returned with questions for the court. From the record the following exchange occurred:

> "FOREMAN: The question — we had two questions, really. We'd like to hear a restatement of your charge, and the second question is what happens if there is a hung jury?
>
> "THE COURT: Well, I'm going to answer your first question first — I mean your second question first. Under our legal system in the event that you people cannot reach a unanimous verdict it would be incumbent upon this Court to declare a mistrial, which in effect means that approximately six to eight to twelve weeks from now another jury would be empaneled, another jury would hear the exact same evidence that you heard, would hear the exact same charge that you heard and then it would be submitted to that jury...."

The appellant contends that this charge was erroneous. No exception was taken to this charge. Appellant relies on the "plain error" rule[1] for his preservation of error. ARAP, Rule 45A.

Section 13-11-2(c), Code of Ala. 1975, states the course to be followed in the event of a mistrial in a capital felony:

> "... The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole."

Appellant asserts that the court's failure to apprise the jury of the option contained in § 13-11-2(c) was prejudicial.

Although the trial court's answer to the jury's question did not comprehensively track all the language of § 13-11-2(c), we hold that the instruction given (or lack of option apprisal) did not constitute "plain error" within the

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1. ARAP, Rule 39(k), concerning certiorari has been held applicable to the trial court's oral instructions. Ex parte Jacobs, 371 So.2d 448 (Ala. 1979).

meaning of ARAP, Rule 45A. For that rule to apply there must first be error, and it must be plainly visible in the record. Colley, supra. Here, the trial court's instruction was correct so far as it went. It did not misstate the law. That "another jury could hear the exact same evidence" and "would hear the exact same charge" in the event of a hung jury was a very real possibility and indeed a probability. We note that the trial court's response in no way curbed the jury's right to fail to decide appellant's fate. A "hung jury" could still easily have occurred.

Moreover the "option" to reindict the appellant at a later time for a noncapital offense rested entirely with the State. The "option" would at no time become the "appellant's option." It is sheer speculation whether the jury would have failed to reach a unanimous verdict had they been informed of the State's option. It is further speculation whether the appellant would have been reindicted for a noncapital offense in any event. This court will not base its opinion on speculation or surmise. Thus on this issue we are required to decide whether an omission in the trial court's instruction in response to the jury question effectively deprived appellant of his right to a fair trial free from prejudice. We do not believe that it did. Where a trial court's instruction to the jury is not as full as counsel desires, his remedy is to request written charges covering the matter omitted. Smith v. State, 262 Ala. 584, 80 So.2d 307 (1955). Here, counsel for appellant neither excepted nor requested further instructions to the jury. Accordingly, we hold the"plain error"rule inapplicable in this instance.

V

Several questions are raised concerning the trial court's order after the sentence hearing was conducted. For the sake of clarity we set forth the entire order of the court sentencing the appellant to death.

"The Court having conducted a hearing pursuant to Title (sic) 13-11-3 of the Code of Alabama, to determine whether or not the Court will sentence Mr. Phillip Wayne Tomlin to death or to life imprisonment without parole, and the Court having considered the evidence presented at the trial and at said sentencing hearings; the Court makes the following findings of fact:

"The Court first considers the aggravating circumstances as outlined and described in Title (sic) 13-11-6:

"(a) The Court finds that the Capital Felony was committed by Phillip Wayne Tomlin or that he was present at and assisted in the commission of the Capital Felony;

"(b) The Court finds no evidence that Mr. Phillip Wayne Tomlin was previously convicted of another Capital Felony. However the Court finds that the Defendant has been in and out of trouble with the police on prior occasions;

"(c) The Court finds that other than set out above in subparagraph (b), there is no evidence that the Defendant did knowingly create a great risk of death to many persons;

"(d) The Court finds the Capital Felony was committed while the Defendant was engaged in the commission of a double homicide in violation of Title (sic) 13-11-10;

"(e) The Court finds the Capital Felony was not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

"(f) The Court finds the Capital Felony was not committed for pecuniary gain, within the meaning of Title (sic) 13-11-6(6) of the Code of Alabama.

"(g) The Court finds the Capital Felony was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

"(h) The Court finds that Phillip Wayne Tomlin killed or participated in the double murder of Cheryl Moore, a teenager of fifteen years of age, and Richard Brune, a teenager of nineteen years of age, at the Interstate 10 Highway Exit Ramp at Theodore-Dawes, Mobile County, Alabama.

"It is the judgment of the Court that the Capital Felony was especially heinous, atrocious, or cruel.

"The Court now considers mitigating circumstances as described and set out in Section 13-11-7, Code of Alabama.

"(a) The Court finds that Phillip Wayne Tomlin has a history of prior criminal activity;

"(b) The Court finds that the Capital Felony itself was not committed while Phillip Wayne Tomlin was under the influence of extreme mental or emotional disturbance;

"(c) The Court finds that the victims were not a participant in Phillip Wayne Tomlin's conduct, and did not consent to the act.

"(d) The Court finds that Mr. Tomlin was not an accomplice in the Capital Felony committed, but was, in fact a principal who was present and assisted in the commission of the double homicide.

"(e) The Court finds that Phillip Wayne Tomlin did not act under extreme duress or under the substantial domination of another person.

"(f) The Court finds that the capacity of Phillip Wayne Tomlin to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired.

"The Court having considered the aggravating circumstances and the mitigating circumstances and after weighing the aggravating and mitigating circumstances, it is the judgment of the Court that the aggravating circumstances far outweigh the mitigating circumstances and that the death penalty as fixed by the Jury should be and is hereby accepted.

"It is therefore considered and adjudged by the Court that Phillip Wayne Tomlin is guilty of the Capital Felony charged in the indictment, and specifically of intentionally killing Cheryl Moore and Richard Brune during the commission of a double murder.

"It is therefore ordered and adjudged that you, Phillip Wayne Tomlin, suffer death by electrocution at any time before the hour of sunrise on the 8th day of March, 1979, inside the walls of the William C. Holman Unit of the Prison System at Atmore, Alabama, in a room arranged for the purpose of electrocuting convicts sentenced to death by electrocution.

"It is therefore further ordered and adjudged by the Court that the Warden of William C. Holman Unit of the Prison System at Atmore, or in the case of his death, disability, or absence, his Deputy, or in the event of the death, disability, or absence of both the Warden and his Deputy, the person appointed by the Commissioners of Corrections, at any time before the hour of sunrise shall on the 8th day of March, 1979, inside the walls of the William C. Holman Unit of the Prison System at Atmore, in a room arranged for the purpose of electrocuting convicts sentenced to death by electrocution, cause to pass through the body of said Phillip Wayne Tomlin, a current of electricity of sufficient intensity to cause his death, and the continuance and application of such current through the body of the said Phillip Wayne Tomlin until the said Phillip Wayne Tomlin be dead, and may Almighty God have mercy on Your Soul."

It is argued that certain aggravating circumstances found by the trial court in the above order are not aggravating circumstances as defined in § 13-11-6, Code of Ala. 1975. We agree. A basic rule of review in criminal cases is that criminal statutes are to be strictly construed in favor of those persons sought to be subjected to their operation, i.e. defendants. Ex parte Clements, 370 So.2d 723 (Ala. 1979); Schenher v. State, 38 Ala.App. 573, 90 So.2d 234, cert. denied, 265 Ala. 700, 90 So.2d 238 (1956). Penal statutes are to reach no further in meaning than their words. Clements, supra; Fuller v. State, 257 Ala. 502, 60 So.2d 202 (1952).

The first aggravating circumstance listed by the trial court, "that the Capital Felony was committed by Phillip Wayne Tomlin or that he was present at and assisted in the commission of the Capital Felony," is not an aggravating circumstance within the meaning of § 13-11-6 and should not be listed as such. That finding is closer akin to a finding of fact as per § 13-11-4. The second sentence of the trial court's finding in paragraph (b) of the aggravating circumstances is inappropriate for the same reason. Likewise is the trial court's fourth aggravating circumstance (d) defective. That "the Capital Felony was committed while the Defendant was engaged in the commission of a double homicide in violation of Title (sic) 13-11-10," is not an aggravating circumstance within § 13-11-6. Section 13-11-10 is not contained in the Code. Also, the first part of the trial court's eighth aggravating circumstance (h), "that Phillip Wayne Tomlin killed or participated in the double murder of Cheryl Moore, a teenager of fifteen years of age, and Richard Brune, a teenager of nineteen years of age, at the Interstate 10 Highway Exit Ramp at Theodore-Dawes, Mobile County, Alabama," is not an aggravating circumstance.

The above "aggravating circumstances" are not contained in the § 13-11-6 language and should not have been included as such in the trial court's sentencing order as aggravating circumstances.

That the capital felony was especially heinous, atrocious, or cruel is an aggravating circumstance under § 13-11-6(8); however, the trial court is required to set out the basis of such a finding. See: Colley, supra; Hubbard v. State, ___ So.2d ___, (Ala.Cr.App. 1979); Johnson v. State, ___ So.2d ___, (Ala.Cr.App., May 22, 1979); Alford v. State, 307 So.2d 433, (Fla. 1975); State v. Dixon, 283 So.2d 1 (Fla. 1973).

To negate one of the mitigating circumstances, the trial court must determine whether appellant has a significant history of prior criminal activity within the meaning of Ex parte Cook, 369 So.2d 1251, 1257 (Ala. 1978). It is not sufficient that appellant had a "history of prior criminal activity" to negate the mitigating circumstance of § 13-11-7(1). Appropriate facts which substantiate this finding should be listed.

Though not raised by the appellant, we note that the trial court's order does not contain a statement of "the findings of fact from the trial" as required by § 13-11-4. The pertinent portion of § 13-11-4, Code of Ala. 1975, reads as follows:

> "... If the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:
>
> "(1) One of more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death; and
>
> "(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances."

See Johnson, supra, for comprehensive findings of fact accompanied by aggravating and mitigating circumstances by the trial court upon the conclusion of the sentence hearing.

We have carefully searched the record for any error prejudicial to the appellant. We have applied the "plain error rule." After due consideration to the record and to the alleged errors asserted on appeal, it is our opinion that the appellant received a fair trial.

However, due to the deficiencies in the sentencing order, this cause must be remanded with directions that the trial court's order be extended to include findings of fact from the trial and sentence hearing and for a correction of aggravating and mitigating circumstances as defined by the statute and that such be transmitted to this court in answer to the instant remand.

AFFIRMED IN PART; REMANDED WITH DIRECTIONS.

Tyson and DeCarlo, JJ., concur.
Harris, P.J., and Bowen, J., concur in result only.

BOWEN, J, concurring in result.

I disagree with the holding of the majority in Part IV of its opinion.

I concur only in the result reached by the majority because, in my opinion, the plain error rule of ARAP, Rule 45A, does apply to instructions which the trial judge failed to mention to the jury. Omissions from the charge may constitute error just as may misstatements or incorrect charges. The absence of certain instructions, by their very absence, will be just as "plainly visible" as an incorrect charge.

The majority states that the plain error rule is inapplicable but then finds that the omission does not prejudice the defendant. In effect, they apply the plain error rule while denying its applicability. I would merely apply the rule.